Supreme Court, U.S.
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No. 06- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

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RENE VAZQUEZ-BOTET,

Petitioner,

v.

UNITED STATES,

Respondent.

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

◆

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a criminal case, a circuit court's appellate jurisdiction to review the orders of a district judge is narrowly confined by statute. Only a select few orders can be appealed by the United States. *See* 18 U.S.C. § 3731. If, however, the district judge's "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), the circuit court may exercise mandamus jurisdiction to disqualify the district judge from further proceedings. Before the First Circuit's opinion below, these avenues of jurisdiction were harmonious because "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," and "only in the rarest circumstances" would they ever "evidence the degree of favoritism or antagonism required ... when no extrajudicial source is involved." *Liteky v. United States*, 510 U.S. 540, 555 (1994). However, in this criminal case, the First Circuit ordered a district judge to recuse himself based solely on its disagreement with the district judge's preliminary (non-appealable) rulings regarding claims of prosecutorial misconduct before the grand jury. *In re United States*, 441 F.3d 44 (1st Cir. 2006). The question presented in this petition, therefore, is:

> Whether a circuit court may circumvent the statutory limitations on appellate jurisdiction in 18 U.S.C. § 3731 by invoking mandamus jurisdiction to disqualify a district judge under 28 U.S.C. § 455(a) based solely on the circuit court's disagreement with the district judge's non-appealable orders, where (1) the district judge is not actually biased and (2) no "extrajudicial source factors" indicate that "his impartiality might reasonably be questioned"?

PARTIES TO THE PROCEEDINGS

Rene Vazquez-Botet, the petitioner in this Court, is a defendant in the underlying district court criminal case and was a respondent in the mandamus proceeding before the court of appeals.

Marcos Morell-Corrada is a co-defendant in the underlying district court criminal case and was also a respondent in the mandamus proceeding before the court of appeals.

Hon. Juan Perez-Gimenez, United States District Judge for the District of Puerto Rico, was the judge presiding over the criminal case who was ordered to recuse himself by the court of appeals.

The United States was the petitioner in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rene Vazquez-Botet respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The First Circuit's opinion is reported at *In Re United States*, 441 F.3d 44 (1st Cir. 2006) and reproduced in the appendix hereto as Cert. Appendix A-1 - A-44. That opinion reversed the December 15, 2005, Opinion and Order of the United States District Court for the District of Puerto Rico (Hon. Juan M. Perez-Gimenez), reproduced in the appendix hereto as Cert. Appendix B-1 - B-65.

JURISDICTION

The First Circuit issued its decision on March 24, 2006. Cert. Appendix A-1 - A-44. A timely petition for rehearing was denied by the First Circuit in an order dated May 4, 2006, reproduced in the appendix hereto as Cert. Appendix C-1 - C-2. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Code:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C. § 3731.

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

STATEMENT OF THE CASE

A. INTRODUCTION

This is a case about the misapplication of mandamus jurisdiction to circumvent the narrow appellate jurisdiction created by 18 U.S.C. § 3731 for an appeal by the United States in a criminal case. In the absence of appellate jurisdiction, a 3-judge panel of the First Circuit exercised mandamus jurisdiction, pretrial, to order the recusal of a district judge with whose non-appealable, procedural rulings it (and the government) disagreed. *In re United States*, 441 F.3d 44, 68 (1st Cir. 2006); Cert. Appendix A-44. In doing so, the First Circuit acknowledged that there was no *actual* bias on the part of the district judge, much less an "extrajudicial source factor," *see Liteky v. United States*, 510 U.S. 540, 551 (1994), suggesting that "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Instead, the First Circuit's opinion reflects a mere disagreement with the non-appealable rulings of the district judge, which provides no basis to disqualify a judge from presiding over a case (or, concomitantly, to exercise mandamus jurisdiction pretrial):

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. *Almost invariably, they are proper grounds for appeal, not for recusal.* Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky, 510 U.S. at 550-51 (citation omitted, emphasis added).

In the case at bar, the pretrial controversy centered on a claim by the defense of prosecutorial misconduct in the grand jury, a matter that must be raised and resolved pretrial to avoid rendering the issue moot. *See United States v. Mechanik*, 475 U.S. 66, 72-73 (1986). The district judge was persuaded to conduct further pretrial proceedings to address the claims of grand jury misconduct because the district judge was satisfied that the defense had met its very low burden to make a *prima facie* showing of violations of grand jury secrecy rules – leaks and eavesdropping on the grand jury – based on: (1) an anonymous note from a purported member of the grand jury claiming that the prosecution was eavesdropping; (2) statements of a few members of the grand jury that they were surprised about not being allowed to vote on whether to indict and indicating that the grand jury room was not sound-proof; (3) an acoustical study by a court-appointed expert confirming that "confidential privacy is not maintained" in the grand jury room, giving the government an opportunity to eavesdrop on the grand jury from adjacent rooms; (4) two affidavits from former prosecutors describing the sighting of FBI agents in the vicinity of the grand jury room that should be off-limits to anyone other than grand jurors; (5) a flurry of media reports about sealed proceedings that logically originated from government sources; and (6) communications from the United States Attorney and FBI Special-Agent-In-Charge to the district judge expressing concern over grand jury leaks.

When the First Circuit exercised mandamus jurisdiction to disqualify the district judge, the district judge had not dismissed the indictment, suppressed evidence, nor indicated any predisposition to grant such remedies. Other than continuing the trial date to give himself more time to address the claims of grand jury abuse, the district judge had not granted *any* relief to the defendants or otherwise prejudiced the government's case. Thus, no appellate jurisdiction existed to review the district judge's non-final, preliminary rulings. To be sure, had the district judge proceeded further and *granted* relief (*e.g.* dismissal of the indictment or suppression of evidence), appellate jurisdiction would have arisen at that juncture pursuant to 18 U.S.C. § 3731.

The government and the First Circuit did not approve of the direction in which the district judge was headed, so mandamus jurisdiction was invoked to stop the pretrial proceedings in its tracks. Ironically, the First Circuit found that the district judge was initially justified in taking some judicial action, given the admissions by the U.S. Attorney and the FBI of grand jury leaks. However, the First Circuit disagreed with the district judge's conclusion that the defense made a sufficient showing to warrant further proceedings, so it shut down any fact-finding by the district judge and ordered him off the case:

> We are struck by the district court's insistence, in the course of denying the recusal motion, not only on continuing an investigation that had already yielded results not showing any government wrongdoing, but also on resuscitating leak claims that had been dormant for over a year. We are struck by its orders that the government disclose yet further information as to the return of the indictment by the third grand jury, even when the government had already provided explanations, despite there being little basis in the law or in fact for the inquiry. Of particular concern is the decision by the district court to delay the trial, apparently in order to reserve the power to dismiss the indictment, when there was never any realistic basis to consider dismissal of the indictment as a remedy.
>
> We conclude that the cumulative effect is to establish a reasonable basis for questioning the impartiality of the district court judge. In light of that conclusion, we order recusal of the present district judge and that the case be assigned on remand to a different judge. We do so with no criticism of the judge, who was faced with a series of difficult issues. We also order that on remand the case be promptly set for trial. And, in the absence of any new evidence of government misconduct under Rule 6, we order termination of the present investigation.

In Re United States, 441 F.3d at 68; Cert. Appendix A-43 - A-44.

Under *Liteky*, the First Circuit's disagreement with the non-appealable decision of the district judge to conduct further pretrial proceedings on petitioner's grand jury abuse motion was not a basis to order recusal of the district judge. Here, as in *Liteky*, the asserted grounds for disqualifying the district judge–

> consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses. All occurred in the course of judicial proceedings, *and* neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.

Liteky, 510 U.S. at 556.

In the face of the well-settled principles of recusal jurisprudence, *see Liteky*, *supra*, and the limited appellate jurisdiction over government appeals conferred to the circuit courts by Congress, *see* 18 U.S.C. § 3731, the First Circuit's published opinion represents a remarkable, if not cavalier, expansion of appellate review disguised, we submit, as mandamus jurisdiction. The First Circuit's opinion is an open invitation to litigants in criminal cases to invoke mandamus jurisdiction to seek interlocutory review of pretrial rulings for which Congress has not authorized appellate jurisdiction. It encourages litigants in general – and prosecutors in particular – to question and challenge the impartiality of district judges based solely on disagreements with their not-yet-appealable decisions.

In light of the narrow appellate jurisdiction conferred upon the circuit courts, this Court should grant certiorari to contain the scope of mandamus jurisdiction and to discourage disgruntled litigants, including prosecutors, from misusing recusal motions as a short-cut to, and subterfuge for, appellate review.

B. THE COURSE OF PROCEEDINGS IN THE DISTRICT COURT[1]

In August and September of 2003, the two highest-ranking law enforcement officials in the District Puerto Rico – the U.S. Attorney and the Federal Bureau of Investigation Special Agent-In-Charge ("FBI/SAC") – concluded that newspaper stories about the investigation that eventually led to the indictment of the petitioner, as well as stories about other unrelated investigations, "included sealed grand jury information in apparent violation of law and indicating a leak" and warranted a "broad based investigation to identify the source of these leaks." (DE 225, Composite Exhibit B.) The United States Attorney was so concerned about the leaks that he brought the matter to the attention of Honorable Juan M. Perez-Gimenez, who, at the time, was acting as the Chief Judge for the District of Puerto Rico.

By October 2003, however, prosecutors from Washington had removed the U.S. Attorney's Office from the investigation and refused to investigate the apparent violations of Fed. R. Crim. P. 6(e). (DE 211, Composite Exhibit I; App. Tab. 27.) The petitioner, as one of the identified targets of the grand jury investigation, filed motions with Judge Perez-Gimenez, requesting that he investigate the leaks, but he declined to do so. The Washington prosecutors did not question Judge Perez-Gimenez's impartiality after he ruled in their favor on petitioner's motions.

On April 8, 2004, Federal Grand Jury No. 03-1, returned an initial indictment against the petitioner and a co-defendant, triggering both the application of the Federal Rules of Criminal Procedure and the panoply of rights afforded by the Constitution to criminal defendants. By coincidence, the case was randomly assigned Judge Perez-Gimenez. Despite the return of an indictment, the grand jury investigation continued, and, between April and July 2004, so did the leaks from the grand jury, despite a protective order entered by Judge Perez-Gimenez on May 7, 2004 at the request of petitioner Vazquez-Botet. 441 F.3d at 51-52; Cert. Appendix A-9.

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[1] "DE" refers to the docket entry number of the pleadings and orders filed in the district court. "App." refers to the appendix filed by petitioners in the First Circuit along with their response in opposition to the government's petition for a writ of mandamus.

During this same post-indictment time period, petitioner's counsel received an anonymous letter from someone claiming to be a former grand juror. The letter accused agents and/or prosecutors of eavesdropping on the grand jury's deliberations in violation of Fed. R. Crim. P. 6(d)(2) and 6(e)(3)(A). The continuing leaks, combined with the anonymous letter, triggered a new round of motions by petitioner and his co-defendant requesting that Judge Perez-Gimenez investigate the potential misconduct. (DE 33, 35, 51, 57.)

Although the government could have investigated the new allegations, it again refused to do so. Judge Perez-Gimenez, however, took the defense allegations more seriously and, in November 2004, directed a U.S. Magistrate to question the grand jurors. After doing so, the Magistrate issued a report finding that the defense claims about "possible irregularities" in the grand jury proceedings were "inconclusive." (App. Tab 11.) On March 3, 2005, the government returned a superseding indictment. Thereafter, petitioner moved Judge Perez-Gimenez to order an acoustical examination of the grand jury room and to have "this matter further investigated by the Court." (DE 167) The latter request was supported by affidavits from two former Assistant U.S. Attorneys who had seen agents in the vicinity of the grand jury room in April and August 2005. (App. Tab 18.) The acoustical report, completed in August 2005, corroborated defense claims that "privacy" was "not maintained" in the grand jury rooms. (DE 186, Report, p. 6.)

In response to the report and petitioner's motion, on August 30, 2005, Judge Perez-Gimenez issued an order postponing the trial so that petitioner's claims of governmental misconduct could be investigated.[2] The order did *not* prejudge the outcome of the investigation or accuse any party or individual of misconduct. The order merely indicated that Judge Perez-Gimenez intended *to investigate* petitioner's claim that government personnel had violated Rules 6(d) and 6(e). This preliminary ruling was plainly not appealable under § 3731.

Since the government could not stop the investigation into its alleged misconduct by a direct appeal of the judge's orders, the government sought to do so by attacking Judge Perez-Gimenez's impartiality. After Judge Perez-Gimenez announced his intention to grant the defense motions to investigate the potential violations, on October 3, 2005, the government filed a motion to disqualify him under 28 U.S.C. § 455(a), claiming that his decision to investigate petitioner's claim *itself* evinced an appearance of bias against the government. (DE 200) Petitioner opposed the motion and, on December 15, 2005, Judge Perez-Gimenez denied it in a lengthy Opinion and Order. Cert. Appendix B1-B65. Judge Perez-Gimenez believed the defense motions provided a *prima facie* showing of possible violations of Rules 6(d) and 6(e) and that the government was "displeased with the Court's rulings" and "has chosen to wield its recusal motion as a tactical weapon against this Court in hopes of being heard by a different judicial officer more to its liking." Cert. Appendix B-10.

C. THE COURSE OF PROCEEDINGS IN THE FIRST CIRCUIT

While circuit courts would have no jurisdiction under § 3731 to consider a government appeal of a district court's preliminary ruling to investigate possible government misconduct in a criminal case, circuit courts do have jurisdiction to review, through writs of mandamus, a district court's denial of a government motion to recuse. When Judge Perez-Gimenez denied the government's recusal motion, the government immediately filed such a petition, seeking an order from the First Circuit recusing Judge Perez-Gimenez and halting his inquiry into petitioner's claims of government misconduct.[3]

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[2] A delay may have been required anyway because the government had not yet completed its discovery obligations. (DE 195)

Despite this Court's holding in *Liteky v. United States*, 510 U.S. 540, 555 (1994), that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," the First Circuit granted the government's petition and issued a writ of mandamus. *In Re United States*, 441 F.3d 44 (1st Cir. 2006); Cert. Appendix A-1 - A-44. As discussed in more detail below, the First Circuit held that Judge Perez-Gimenez's rulings were wrong and that these wrong rulings, standing alone, justified both his recusal and an order reversing his otherwise unappealable rulings. In so ruling, the First Circuit created a method of interlocutory review that conflicts with § 3731 and *Liteky*. This Court should grant the instant petition to overrule the First Circuit's unprecedented expansion of the government's ability to "appeal" unfavorable pretrial rulings through attacks on the integrity of federal judges.

The First Circuit began its opinion by accepting the government's view that the standards for recusal under § 455(a) and mandamus review were linked to the government's complaints about the district court's *rulings* on petitioner's pretrial motions. 441 F.3d at 57; Cert. Appendix A-20. However, the First Circuit did not find that Judge Perez-Gimenez was entirely wrong. In fact, the First Circuit found that the judge did, in fact, have "entirely legitimate concerns about the leaks to the media," *id.* at 50; Cert. Appendix A-7, but faulted the judge for not commencing an investigation into them until August 2005,[4] and for continuing the investigation in December 2005.[5] *Id.* at 61; Cert. Appendix A-28 - A-30.

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[3] Although the government filed the petition under seal, that same day the media in Puerto Rico reported that the government had asked Judge Perez-Gimenez to stay the proceedings and that it intended to file an appeal "in the coming days." Then, on January 24, 2006, another article reported that the government had asked the First Circuit to reverse Judge Perez-Gimenez's ruling and that, although the pleadings had been filed "under seal at the end of last week," it was expected that the First Circuit would order them unsealed. Although the First Circuit later did so, due to the First Circuit's disqualification of Judge Perez-Gimenez, *see infra*, there has been no inquiry into how the media found out about the nature and substance of the government's sealed pleadings. Copies of the January 2006 articles discussed in the text were attached to the Respondents' Opposition To the Petition For a Writ of Mandamus, as APPENDIX 4.

With respect to the potential violations of Rule 6(d), the First Circuit questioned, but did not ultimately decide, whether Judge Perez-Gimenez "ever" had the authority to investigate the "eavesdropping" allegations. *Id.* at 63; Cert. Appendix A-34 ("[w]e need not decide whether there can be some form of impermissible grand jury shopping which would warrant court inquiry"). However, the First Circuit believed that once the government filed an *ex parte* explanation for its conduct, the court had "no basis to look behind" that explanation. *Id.* The First Circuit also reasoned that whatever the district court found would not have justified dismissing the indictment and, hence, the district court should not have delayed the trial. *Id.* at 68; Cert. Appendix A-43 - A44.[6]

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[4] The record establishes that Judge Perez-Gimenez was waiting for the completion of the acoustical examination. That report directly supported petitioner's eavesdropping claim under Rule 6(d) and expanded the potential class of government personnel who could have been responsible for the grand jury leaks in violation of Rule 6(e).

[5] The First Circuit based this finding, in part, on its contention that the "independent DOJ" had conducted an "investigation" into the leaks and "had found nothing." 441 F.3d at 61; Cert. Appendix A-30. In fact, the record reflects that in response to petitioner's complaints about grand jury leaks, the DOJ Office of Professional Responsibility wrote counsel indicating that the Office had "decided *not to initiate* an investigation" into the complaints. (DE 211, Composite Exhibit I, App. Tab 27; emphasis added)

Although the First Circuit rejected the government's claim that Judge Perez-Gimenez was actually biased, 441 F.3d at 65-66; Cert. Appendix A-38 - A-40, having decided that Judge Perez-Gimenez was "wrong" in his rulings, the First Circuit concluded that it was reasonable to infer that he no longer was acting with the requisite appearance of impartiality. Hence, in the First Circuit's view, Judge Perez-Gimenez's choices were to either (1) deny the defense motions without an investigation or (2) recuse. When the judge chose, instead, to pursue petitioner's motions, the government was entitled to interlocutory relief through the vehicle of a petition for a writ of mandamus.

The case has now been reassigned to Chief United States District Judge Jose Fuste, who set a trial date of September 25, 2006.[7] Petitioner is on bond pending trial.

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[6] The First Circuit's reasoning necessarily assumes, contrary to anything in the record, that the case was ready for trial. In fact, the government had not completed discovery. (DE 195)

[7] In the court below, petitioner is presently seeking recusal of the Chief Judge because his spouse is the attorney for two cooperating government witnesses who will be testifying against petitioner at the trial.

REASONS FOR GRANTING THE WRIT

THE FIRST CIRCUIT'S OPINION CIRCUMVENTS THE STATUTORY LIMITATION ON APPELLATE JURISDICTION IN CRIMINAL CASES BY INVOKING MANDAMUS JURISDICTION TO DISQUALIFY A DISTRICT JUDGE BASED SOLELY ON THE CIRCUIT COURT'S DISAGREEMENT WITH THE DISTRICT JUDGE'S NON-APPEALABLE RULINGS, DESPITE NO ACTUAL BIAS AND NO "EXTRAJUDICIAL SOURCE FACTORS" INDICATING THAT THE DISTRICT JUDGE'S "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED."

Section 455(a) of Title 28 of the United States Code requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This Court in *Liteky v. United States*, 510 U.S. 540 (1994), held that the "extrajudicial source" doctrine, which had developed under an earlier recusal statute, 28 U.S.C. § 144, also applied to § 455(a). *Liteky*, 510 U.S. at 554. That doctrine, the Court explained, bars a party from obtaining the disqualification of a judge for having an "unfavorable disposition" toward that party when the judge's views are derived from the judge's involvement in that proceeding or earlier proceedings involving the same party. *Id.* at 551. The only exception this Court identified was if the judge's unfavorable opinion was "so extreme as to display clear inability to render fair judgment" – the so-called "'pervasive bias' exception to the 'extrajudicial source' doctrine." *Id.* at 551 (citations omitted). Thus, "judicial rulings alone *almost never* constitute a valid basis for a bias or partiality motion" and "can only *in the rarest circumstances* evidence the degree of favoritism or antagonism required .... when no extrajudicial source is involved. *Almost invariably*, they are proper grounds for appeal, not for recusal." *Id.* at 555 (emphasis added). Nowhere in its opinion endorsing the continued application of the extrajudicial source rule did this Court imply that the government – a party in every federal criminal case – was exempt from these principles.

This Court then gave examples of what it meant by a "rare circumstance" where a court's judicial conduct "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible." The Court referred to statements made by the district court in *Berger v. United States*, 255 U.S. 22 (1921), which evinced the judge's belief that "German Americans" had "hearts ... reeking with disloyalty." *Id.* at 555 (quoting *Berger*, 255 U.S. at 28). Conversely, the Court added: "*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Id.* at 555-56 (emphasis in original).

Accordingly, absent an obvious on-the-record display of bias, such as the ethnic slur in *Berger*, judicial rulings, even if uttered in angry tones, may not legitimately form the basis of a recusal motion: "A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – *remain immune*." *Id.* at 556 (emphasis added).

Nothing Judge Perez-Gimenez said in his preliminary rulings on petitioner's motions evinced any bias, much less the "extreme" and "pervasive" anti-government bias that might justify disqualification predicated on judicial rulings.[8] While the judge showed a concern over leaks from the grand jury, so did the U.S. Attorney, the FBI SAC and, indeed, even the First Circuit. 441 F.3d at 60-61; Cert. Appendix A-28, A-30 (finding that "[t]here was no error in the district court's initial actions in response to leaks to the media" and, later, finding that "[t]he protective order issued on May 7, 2004, applicable to both sides, was also proper"). There is nothing in this record remotely approaching the comments made in *Berger*. Nor did Judge Perez-Gimenez say anything suggesting he had prejudged the outcome of the inquiry into possible violations of Rules 6(d) and 6(e) – he merely was allowing an inquiry to go forward. The worst even the First Circuit had to say about Judge Perez-Gimenez's conduct was that, while his *rulings* were *initially proper*, he committed errors of law in deciding that he had a sufficient factual basis to *continue* investigating defense claims of misconduct.[9]

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[8] The government has never alleged that Judge Perez-Gimenez possessed a "pervasive" bias against the government and, consistent with that position, has not sought his disqualification from any other criminal cases. The First Circuit also rejected the government's claim that Judge Perez-Gimenez was actually biased against it in this case. 441 F.3d at 65-66; Cert. Appendix A-38 - A-40.

The First Circuit nonetheless ruled that Judge Perez-Gimenez should be disqualified under § 455(a) because his preliminary rulings against the government were wrong. In its first recitation of the recusal standards governing § 455(a), the First Circuit thus contended that the recusal standard was linked directly to an analysis of whether the district court's rulings were correct: "Whether the investigation should be terminated *depends on* whether there is a sufficient reason to suspect that there were Rule 6 violations by the government; we conclude there is not." 441 F.3d at 57 (emphasis added); Cert. Appendix A-20. At this point in its discussion of § 455(a), the First Circuit completely ignored *Liteky*. The First Circuit should have begun its analysis by asking whether it had appellate jurisdiction over district court's preliminary rulings. Because it plainly did not, the First Circuit then should have asked whether the rulings, or something the judge said in rendering them, evinced the type of "pervasive" bias to satisfy the narrow "pervasive bias" exception to the extrajudicial source rule to warrant the exercise of mandamus jurisdiction.

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[9] While faulting Judge Perez-Gimenez for taking too much time to initiate the investigation, the First Circuit excused the government's delay in filing its recusal motion until October 2005 because a recusal motion is a "very serious matter" that "must have a factual foundation" based "on an accumulation of events" that "may take some time to build." 441 F.3d at 65; Cert. Appendix A-37 - A-38. Because a claim of government misconduct is also a very serious matter, the First Circuit should have applauded, rather than criticized, Judge Perez-Gimenez for waiting until the evidence had sufficiently "accumulated" to finally grant petitioner's requests for a further inquiry.

Instead, the First Circuit seized on this Court's comment in *Liteky* that the extrajudicial source doctrine was "not the exclusive basis for establishing disqualifying bias or prejudice." 441 F.3d at 67 n. 20; Cert. Appendix A-41. According to the First Circuit, the extrajudicial source doctrine did not apply to the government's petition because Judge Perez-Gimenez's rulings (1) would delay the trial and (2) implicated separation of powers concerns due to the judiciary investigating misconduct by the executive branch. *Id.* at 67; Cert. Appendix A-41 - A-42. This never before recognized "government-litigant" exception to the extrajudicial source doctrine (our characterization) is unsupported by any decision of this Court or any other circuit court construing the recusal statute and does not withstand scrutiny.

Ordering recusal based solely on the government's disagreement with preliminary and otherwise non-appealable judicial rulings vastly expands the circuit court's mandamus jurisdiction and circumvents the statutory limitations imposed by Congress upon the circuit court's appellate jurisdiction. *See* 18 U.S.C. § 3731. In a variety of contexts, judges are asked to hold hearings on defense claims of government misconduct. Numerous doctrines also authorize "investigations" into possible government misconduct during a district court's routine administration of criminal cases assigned to them. For example, district judges are authorized to "investigate" and decide claims of: (1) vindictive prosecution, *Wasman v. United States*, 468 U.S. 559 (1984); *Blackledge v. Perry*, 417 U.S. 21 (1974); (2) selective prosecution, *United States v. Armstrong*, 517 U.S. 456 (1996); *Wayte v. United States*, 470 U.S. 598 (1985); (3) double jeopardy and bad faith, *Oregon v. Kentucky*, 456 U.S. 667 (1982); *United States v. Dinitz*, 424 U.S. 600 (1976); (4) discovery violations, *Kyles v. Whitley*, 514 U.S. 419 (1995); (5) intrusions into the defense camp, *United States v. Henry*, 447 U.S. 264 (1980); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *Black v. United States*, 385 U.S. 26 (1966); (6) grand jury abuse, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); and (7) outrageous government conduct, *Hampton v. United States*, 425 U.S. 484 (1976).

Defendants also frequently seek the suppression of evidence obtained through the execution of search warrants based on the contention that government personnel intentionally made false statements or material omissions in the affidavits used to secure them. In *Franks v. Delaware*, 438 U.S. 154 (1978), this Court held that a district court is required to convene a hearing to, in the First Circuit's parlance, *investigate* such claims "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155. Until now, the timing of appellate review was limited to two scenarios:

> (1) If the hearing was granted, the government would have no right to appeal under § 3731 unless and until the district court thereafter ordered the suppression of evidence; or
>
> (2) If the suppression motion was denied without a hearing, the defendant would have no right to appeal unless and until he was convicted.

Now, under the First Circuit's reasoning, the government can obtain review by the appellate court before ever having its conduct examined at a hearing. The government need only allege that the district court has convened a hearing without the requisite factual basis, thereby evincing an appearance of bias against the government. If the judge does not halt the inquiry and recuse, the First Circuit's opinion subjects the judge's preliminary, non-appealable ruling to *de facto* appeal through a writ of mandamus aimed at the judge's integrity.

In none of its opinions construing §144 and § 455 has this Court ever suggested that a district court's erroneous decision to convene a hearing on a claim of government misconduct or to grant discovery on such a claim subjects the district court judge to disqualification for evincing an appearance of anti-government bias. Nor has any other circuit construed recusal standards differently when the government is the litigant.

The First Circuit's reliance on the "separation of powers" doctrine to create a "government-litigant" exception to the extrajudicial source rule was thus entirely misplaced. At all times, Judge Perez-Gimenez was merely responding to motions filed by the petitioner and his co-defendant (and the concerns of the U.S. Attorney and the FBI-SAC), just as he would have been required to do if the petitioner had filed a motion to suppress evidence and sought a *Franks* hearing, or if he had filed a motion to exclude evidence in violation of the *Kyles/Brady* rule, or a motion to dismiss the indictment for selective or vindictive prosecution. In all of these contexts, as well as others noted above, federal courts are routinely asked to, in effect, "investigate" defense claims of misconduct by government personnel. Yet, there is no "separation of powers" bar to the district court doing so and no reasonable inference of bias when a district court does not accept the government's self-serving denials of misconduct as conclusive.[10]

Nor is there a "separation of powers" bar to the district court's power to respond to petitioner's motions. Even *pre*-indictment, "the practical responsibility for controlling grand jury excesses lies with the district court, on which the grand jury must rely for subpoena [enforcement] and contempt procedures." *In re Pantojas*, 628 F.2d

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[10] The First Circuit's view that government denials of misconduct must be accepted by the judiciary is contrary to even its own precedents. *See In re Grand Jury Proceedings*, 814 F.2d 61, 72 (1st Cir. 1987) (rejecting the argument that a district court must accept an *ex parte* affidavit from an FBI Agent "to prove that the grand jury is acting independently"). *See also In Re Grand Jury Investigation (Lance)*, 610 F.2d 202, 219-20 (5th Cir. 1980) (noting that "[i]n all of the cases" discussed in its opinion "the government official responsible for the investigation denied by affidavit that any person associated with the government had disclosed information in violation of Rule 6(e)").

701, 704-05 (1st Cir. 1980). In this *post*-indictment case, Judge Perez-Gimenez had not only the power but also the duty to investigate all forms of government misconduct that could affect the integrity of the ongoing grand jury proceedings and the petitioners' right to a fair trial in the indicted criminal case. Delaying a trial to consider a defense motion is not grounds for recusal or *de facto* appeal just because the motion alleges government misconduct. If Judge Perez-Gimenez later turned out to have been "wrong" in believing that the evidence warranted such an "investigation," the government's appellate remedies would not have been triggered under § 3731 until and unless the judge excluded evidence or dismissed the charges.

Contrary to the First Circuit's deferential construction of the separation of powers doctrine, the Fourth Circuit has held that, upon a sufficient *prima facie* showing of a Rule 6(e) violation, a district court not only has the power but the "duty to investigate" the claim "and impose contempt sanctions when it finds a violation has occurred." *Finn v. Schiller*, 72 F.3d 1182, 1189 (4th Cir. 1996). In exercising this duty, the Fourth Circuit has emphasized that district courts "must not tolerate violations of Rule 6(e) by anyone, *especially United States Attorneys....*" *Finn*, 72 F.3d at 1189 (emphasis added).

The First Circuit's contention that the separation of powers doctrine limits a district court's power to even investigate claims of government misconduct is also contrary to this Court's views on a federal court's inherent power to protect itself as an independent branch of government:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither *prosecutors*, counsel for defense, the accused, witnesses, court staff *nor enforcement officers coming under the jurisdiction of the court* should be permitted to frustrate its function.

Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (emphasis added).

The creation of a "government-litigant" exception to the extrajudicial source doctrine is not only unprecedented and unsupported by the separation of powers rationale relied upon by the First Circuit but, if allowed to continue, would pose a serious threat to the judiciary. If the government is permitted to seek recusal and then mandamus relief in the circuit courts based on rulings the government believes are simply wrong, "the result would be a virtual 'open season' for recusal." *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986). The government would be given free rein to "manipulat[e] the system for strategic reasons, perhaps to obtain a judge more to [its] liking." *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989).

This Court should not underestimate the government's willingness to make accusations against, and question the integrity of, judges as retaliation for adverse rulings. For example, in *United States v. Woodward*, No. CR 00-J-213 S (N.D. Ala. April 21, 2004), *2004 U.S. Dist. LEXIS 26032*, Judge Inge P. Johnson recused herself not only from that particular case but, at least for "a decent cooling off period," from *all* criminal cases on her docket based on such an attack:

> In today's somewhat cynical world, accusation morphs into perception, and perception morphs into reality. Now that the motion to recuse this judge has been featured in the newspaper, the genie is out of the bottle. No purpose would be served at this juncture by the undersigned judge's undertaking to answer, charge by charge, the various allegations in the motion to recuse filed by the United States. It is true, of course, that this judge was displeased with the way the Government's lawyers and law enforcement personnel performed in this case, and said so. There was nothing hidden about it. If being unhappy with counsel for a litigant is cause for recusal, there would be a lot of recusals.
>
> Although the court has set a briefing schedule in the motion to recuse, a debate between defendants and the Government would only exacerbate a bad situation. The scheduling order is therefore VACATED.

> Speaking of perception, it may be perceived that this court is taking the easy way out by leaving to some other judge the daunting task that this case presented from the start.... Nevertheless, when the United States Attorney herself is willing to swear (without a notarization?) that this judge is biased against the Government, this judge declines to engage in an unseemly swearing match with her. Whether she and her fellow U.S. Attorneys are playing games or are truly convinced that the Government cannot receive a fair trial from this judge, they have now displayed their stridently expressed feelings prominently to the general public. Under the circumstances, everybody will be better off if the undersigned steps aside in this and in all other of the Government's cases in which the U.S. Attorney for the Northern District of Alabama appears until a decent cooling off period has passed. The Government and its agencies that are represented by the U.S. Attorney should not be forced to try cases before a judge who has been slandered by the U.S. Attorney.

Before the opinion issued by the First Circuit in the instant case, however, the success of the government's tactic of attacking the integrity of judges whose rulings were unfavorable to it rested solely on the discretion of the slandered judge to voluntarily step aside. Judges less intimidated than Judge Johnson in *Woodward* were free to deny such recusal motions, knowing the government would have no appeal/mandamus trump card left to play. *See, e.g., United States v. Roberts*, 947 F. Supp.2nd 1544, 1546 (E.D. Okla. 1996) (Hon. Judge Frank H. Seay denying government's motion to recuse based, in substantial part, on claims that "certain rulings made by the court reflect[ed] a hostility or prejudice against the government").[11] The First Circuit's opinion would, of course, give the government that trump card. Once given such power, the government surely would use it, thereby promoting more attacks on the integrity of judges as the vehicle to obtain *de facto* appellate review of otherwise non-appealable orders.

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[11] Judge Shea noted that the government had "appeared quite content" with his partiality earlier in the case when the judge denied Roberts' motion to dismiss the indictment and only sought his recusal "after several adverse rulings were entered against it related to the admissibility of evidence." *Roberts*, 947 F. Supp. at 1550, n. 5.

Such a rule would pose a serious threat to the judiciary, whose power lies largely in the public's perception of its impartiality.[12] Such a rule would also, of course, circumvent the limitations Congress established in § 3731 and the presumption against government appeals. *See Arizona v. Manypenny*, 451 U.S. 232, 246 (1981) (a "presumption [exists] that the prosecution lacks appellate authority absent express legislative authorization to the contrary"). Under § 3731, only certain sanctions issued for established violations of Rules 6(d) and/or 6(e) would be appealable, such as orders suppressing evidence or dismissing the indictment. Other potential remedies, such as orders disqualifying the offending prosecutors or agents, granting a change of venue, continuing the trial or referring the offending prosecutors to the Bar for disciplinary actions, would not.

The First Circuit's authorization of recusal/mandamus relief to prevent the alleged unjustified delay in the trial caused by litigation over petitioner's pretrial motions also cannot be squared with § 3731. If the shoe was on the other foot and it was the government that sought a continuance of a trial date, an order denying a continuance would not be appealable under § 3731. Indeed, in dismissing an attempted appeal of the denial of a continuance motion filed by the government in *United States v. Watson*, 386 F.3d 304 (1st Cir. 2004), the First Circuit refused to use the liberal construction clause of § 3731, *see* page 2 *supra*, to construe § 3731 in a way that "would open Pandora's jar, giving the government free rein to appeal from interlocutory orders of virtually every kind and description." *Watson*, 386 F.3d at 308. While refusing to give the government "free rein" to *directly* appeal preliminary rulings in *Watson*, the First Circuit bizarrely has given the government "free rein" to *indirectly* accomplish the same result through attacks on the integrity of judges. This Court should not tolerate the creation of such a rule.

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[12] Justice Scalia made a similar point in denying a motion to recuse filed by the Sierra Club:

> While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

Cheney v. United States Dist. Court for Dist. of Columbia, 541 U.S. 913, 928 (2004).

The First Circuit's attempt to base a government-litigant exception to the extrajudicial source rule on the delays caused by litigation into government misconduct does not withstand analysis for other reasons as well. Even if there existed factual support in the record for the First Circuit's belief that the case was ready for trial in August 2005, *but see* notes 2 & 6, *supra*, delay is a feature inherent in any decision of a district court to take seriously a pretrial motion. A court's decision to convene a *Franks* hearing, for example, would also lead to a "delay" in convening the trial. Yet, Congress itself has approved delays pretrial litigation may cause by expressly excluding such delays from the speedy trial calendar. *See* 18 U.S.C. § 3161(h)(1)(F). Indeed, such delays are excludable regardless of whether they are "reasonably necessary." *See United States v. Maxwell*, 351 F.3d 35, 38-39 (1st Cir. 2003) (magistrate's delay in considering severance motion excludable even if delay was overlong, inexplicable, or unreasonable).

If anything, the new avenue of interlocutory review the First Circuit has created for the government will likely increase, not decrease, delays in criminal cases. Whenever a judge takes a defense claim of government misconduct seriously by convening a hearing or granting discovery, the government can delay both that inquiry and the trial through a recusal motion. Whether successful in the district court or in the appellate court through a writ of mandamus, sudden reassignment of the case to another judge, who presumably has an equally busy calendar, will likely engender considerable delay.

The First Circuit also criticized Judge Perez-Gimenez's rulings because it believed that dismissal of the indictment was never going to be a justifiable remedy for the type of misconduct alleged, even if proven. 441 F.3d at 57; Cert. Appendix A-20. The petitioner, however, did not suggest that dismissal was the *only* remedy at Judge Perez-Gimenez's disposal. A host of lesser remedies were available, including: (1) granting a change of venue; (2) requiring extensive jury questionnaires and/or individualized voir dire; and (3) disqualification of the prosecutors and/or agents.[13] Other than perhaps disqualification, *see* note 13, none of these remedies would have triggered the government's right to appeal or the exercise of mandamus jurisdiction.

No doubt, the First Circuit disagreed with Judge Perez-Gimenez's decision to convene a hearing on petitioner's claims of government misconduct. But the First Circuit did not have appellate jurisdiction to review or second guess the decision at that juncture. Thus, the First Circuit invoked mandamus, despite the oft-repeated words of this Court that mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. United States Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004); *id.* at 392 (Stevens, J., concurring) ("Mandamus is an extraordinary remedy"); *id.* at 393 (Thomas J., concurring in part and dissenting in part) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."); *id.* at 403 (Ginsburg, J., dissenting)

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[13] *See United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992), *rev'd on other grounds*; 29 F.3d 754 (1st Cir. 1994). The First Circuit in *Horn* reversed the assessment of attorney's fees and costs against the government. The other "serviceable fabric" of remedies for the misconduct committed in that case, including the disqualification of the lead prosecutor, were not challenged. *See Horn*, 29 F.3d at 759.

("This Court repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations."). The writ of mandamus should "not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-81. Here, the writ was deployed by the First Circuit to recuse a judge based solely on its disagreement with the district judge's not-yet-appealable rulings, marking an unprecedented expansion of mandamus jurisdiction worthy of certiorari review.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit be granted.

Respectfully submitted,

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APPENDIX A

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(Cite as: 441 F.3d 44)

United States Court of Appeals, First Circuit.

In re UNITED STATES of America, Petitioner.

No. 06-1136.

Heard Feb. 6, 2006.

Decided March 24, 2006.

***48** Kathleen A. Felton, Attorney, Appellate Section, Criminal Division, United States Department of Justice, with whom Alice S. Fisher, Assistant Attorney General, Criminal Division, was on petition for a writ of mandamus and motion to stay district court proceedings, for petitioner.

Howard Srebnick, with whom Black, Srebnick, Kornspan & Stumpf, P.A., Francisco Rebollo Casalduc, Edgar Vega-Pabon, G. Richard Strafer, and G. Richard Strafer, P.A., were on opposition to petition for a writ of mandamus, for respondents Rene Vazquez-Botet and Marcos Morell-Corrada.

Before LYNCH, LIPEZ, and HOWARD, Circuit Judges.

LYNCH, Circuit Judge.

The government petitions for mandamus in this criminal case, seeking, among other relief, an order that the district judge recuse himself on the ground that the judge's impartiality could reasonably be questioned. *See* 28 U.S.C. § 455(a).

On April 8, 2004, a grand jury returned a public indictment charging defendants (and respondents here) Rene Vazquez-Botet and Marcos Morell-Corrada with conspiracy, fraud, and extortion in connection with the bidding process surrounding construction of the "Superaqueduct"-a $305 million public works project in Puerto Rico. Defendants were former officials in the New Progressive Party (NPP): Vazquez-Botet served as campaign manager for former NPP Governor Rossello, while Morell was the Secretary General of the NPP.

Since August 2003, the grand jury proceedings, which took place before three successive grand juries, and the prosecution have been led by attorneys from the Department of Justice's Public Integrity Section, rather than by the local U.S. Attorney's Office, which had previously handled the matter. It was the third grand jury which delivered the April 8, 2004 indictment and the March 3, 2005 superseding indictment (which added one new count against Morell: that he had corruptly influenced the grand jurors and obstructed justice by providing false testimony to the grand jury, in violation of 18 U.S.C. § 1503(a)). [FN1]

> FN1. Another prominent NPP member, the former Vice President of the Puerto Rico House of Representatives, Jose Granados-Navedo, had pled guilty to related charges before the original indictment was returned and agreed to testify for the government against the defendants.

The government's mandamus petition is based on a series of actions taken by the district court in response to allegations of government misconduct as to the grand jury. Defendants have pursued two theories. The first is that government agents violated grand jury secrecy by leaking to ***49** the media protected information from the *second* grand jury. The second is that government agents eavesdropped on confidential conversations by the second grand jury, and that this eavesdropping led the prosecution to engage in "grand jury shopping" when it chose to present the charges for indictment to a third grand jury. The district court (Pérez-Giménez, J.) has conducted an investigation of these allegations over a protracted period of time.

The government has reported to the district court that it has investigated all leaks of grand jury information and found no misconduct by government agents, that it did not engage in eavesdropping, and that its reasons for presenting the indictment to a third grand jury, which it says are not a proper subject for the court to question, were entirely legitimate.

The district court has been unpersuaded. The court has stayed indefinitely the trial date of September 26, 2005, over the government's protest, pending the completion of its ongoing investigation into possible government misconduct as to the second grand jury.

On October 3, 2005, the government asked the judge to remove himself from the case on the basis that his impartiality could reasonably be questioned. *See* 28 U.S.C. § 455(a). It also suggested that the judge was "actually biased against the government and in favor of the defendants." The government's theme was that the judge was "no longer acting as an impartial judicial officer, but instead [had] taken on the role of an inquisitor/prosecutor by conducting an on-going and secret investigation of the government," such that an objective observer informed of the facts would question his ability to be impartial. The government argued that the court had secretly begun its investigation based on vague and dubiously supported allegations of government misconduct, and had continued its "hunt for misconduct" even when the evidence consistently showed none.

On October 28, 2005, the defendants filed an opposition to the government's motions to recuse and to stop the investigation.

The district judge, in an order dated December 15, 2005, refused to recuse himself or to terminate his investigation; indeed, the judge ordered the government to file even further information going to the theories of wrongdoing alleged by the defense. We describe the order in detail in the next section.

On January 17, 2006, the United States filed in this court a petition for mandamus,[FN2] seeking an order that the district judge recuse himself; that the case, on remand, be reassigned to a different judge and promptly set for trial; and that the present investigation directed toward it, in the absence of any new evidence, be terminated. This court expedited briefing [FN3] and argument in this serious case. We now grant the petition for mandamus as to each item of relief sought.

FN2. The decision to file a petition for mandamus is not a local decision, nor even a decision of the Criminal Division of the Department of Justice. It requires the authorization of the Solicitor General of the United States. *See In re United States,* 345 F.3d 450, 453 (7th Cir.2003).

FN3. When the trial court refused to reconsider, or to stay its orders to permit the government to seek review in this court, this court stayed all proceedings in the district court. Further, at the request of this court, the parties and the district court reconsidered whether the many materials which had been filed under seal needed to remain under seal. There was agreement that the majority of the materials could be unsealed; this court ordered that a limited number of documents remain under seal.

*50 I.

Description of Orders Staying Trial and Denying Recusal

On December 15, 2005, the district court denied the United States' motion for recusal and for stay of the investigation, saying the motion was untimely and without merit. It said it was investigating "serious and troubling" allegations of government misconduct under its authority under Rule 6 of the Federal Rules of Criminal Procedure and its inherent supervisory authority. The court found that the defendants had made a prima facie showing of violations of Rule 6(d), Fed.R.Crim.P., on five grounds, and of Rule 6(e), Fed.R.Crim.P. This, it said, "trigger[ed] the Court's duty to investigate and demolish[ed] the government's contention that the Court's investigation constitutes a cognizable ground for recusal under 28 U.S.C. § 455(a)." The court ordered further investigation and disclosure from the government. [FN4]

FN4. As to potential Rule 6(d) violations, the court announced plans to re-interview members of the second grand jury and directed both sides to submit proposed questions. It ordered the government to file sealed, *ex parte* affidavits from all "government employees tied to the instant case who were or might have been" near the grand jury room while the

> second grand jury was in session. It ordered that the government provide affidavits from two agents responding to the allegations in two other affidavits which the defense had earlier submitted to the court. And it ordered the government to certify whether a certain FBI agent had been sworn in as an agent of the second grand jury. As to potential Rule 6(e) violations, the court ordered the government to file sealed, *ex parte* affidavits; the court did not specify what the affidavits should be about, only that they were "[i]n the context of potential Rule 6(e) violations" and must come "from each of the government employees, including government attorneys and investigators, authorized to have access to information obtained in any grand jury investigation of the case against" defendants.

That opinion and order also explained the court's earlier decision, on August 30, 2005, to delay the trial: while it then had no basis to contemplate dismissal of the indictment, "[i]n extreme cases where defendants can establish prejudice, even dismissal of the indictment may be appropriate." The court thus delayed trial, we infer from its stated reason, because it might conclude after further investigation that the purported misconduct was so egregious as to warrant dismissal of the indictment. The court noted that if the case went to trial and the petit jury found the defendants guilty, the petit jury verdict would render any grand jury rule violation harmless. *See United States v. Mechanik,* 475 U.S. 66, 72-73, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). From the court's reasoning, we infer that this was a result which could not be allowed to happen, because it would then take away the court's ability to dismiss the indictment.

II.

Background

The mandamus proceedings must be evaluated against the history of the investigatory activity against the government by the district court.

A. *Misconduct Theory Involving Leaks of Grand Jury Proceedings (Rule 6(e), Fed.R.Crim.P.)*

The court had entirely legitimate concerns about leaks to the media about the second grand jury that sat in this matter. Federal Rule of Criminal Procedure 6(e)(2)(B) provides for grand jury secrecy:

Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

***51** (iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

Fed.R.Crim.P. 6(e)(2)(B).

It was the government which first raised the possibility that there were Rule 6(e) violations. On August 6, 2003, the U.S. Attorney's office voiced concerns to Judge Pérez-Giménez (in his then-capacity as Acting Chief Judge) about news accounts describing grand jury action in an unrelated public corruption case. The judge, on August 7, appropriately requested that U.S. Attorney García contact the FBI and direct a full investigation. García did so and reported to the court that the matter would be investigated and that the investigation would be expanded to include leaks in this case.

Nonetheless, various media accounts about this case appeared in Puerto Rico newspapers, apparently based on leaks from the second grand jury, as the district court noted in its December 15, 2005 opinion.

The newspaper *El Nuevo Día* published an article on December 8, 2003, based on "sources," purporting to describe the identity, content of testimony, and demeanor of witnesses subpoenaed to testify before the second grand jury. The article identified a "federal source" who stated that the "alleged scheme revolves around Vazquez Botet," who might be charged. On December 9, 2003, Vazquez-Botet asked prosecutor Mary K. Butler, a Trial Attorney in the DOJ's Public Integrity Section, to conduct an inquiry into whether "anyone in the inner circle of the investigation" had been leaking grand jury information to the media. Butler referred the matter to the DOJ's Inspector General and the DOJ's Office of Professional Responsibility (OPR) in Washington. On March 25, 2004, OPR notified Vazquez-Botet that, after its review of the matter, no further investigation would be initiated.

On April 20, 2004, after the original indictment, an article in *El Nuevo Día,* citing "a source close to the Super Aqueduct investigation," again purported to describe the testimony and demeanor of witnesses before the second grand jury-including Morell. The next day, on April 21, 2004, Vazquez-Botet asked Judge Pérez-Giménez for a protective order barring government agents from leaking grand jury testimony. In response, the government denied being the source or having knowledge of the leaks; it urged

Vázquez-Botet to forward any direct information he had about the source of the leak to the OPR or to the FBI. The government stated it was "troubled" and would "refer the matter for investigation." The government noted that on April 19 (a day before the *El Nuevo Día* article appeared), it had circulated a proposed protective order; it asked the court to issue that order. On May 7, 2004, the court, quite appropriately, issued to all parties a strongly worded protective order. FN5

FN5. The order, inter alia, applied to the parties a standing order of the court providing that discovery material consisting of statements of actual or prospective government witnesses before a grand jury must be returned to the government upon the conclusion of trial.

On July 9, 2004, after the original indictment, the *San Juan Star* ran an article, based on "sources," identifying witnesses and describing testimony before the second grand jury. It speculated that the prosecution might soon seek a superseding indictment, and it contained a statement, attributed to a government agent, that ***52** "[t]here are still a lot of things that have to be done" in the investigation.

Also on July 9, 2004, Vazquez-Botet, saying that he had "no doubt" that all the grand jury information had come from the government, requested a court investigation of the leaks. Again, the government responded by denying defendants' "baseless" allegations and noting that much of the published information was "largely inaccurate," but indicating it would again refer the issue to the OPR investigators. The OPR informed defendants on September 29, 2004 that, after review, it would not initiate any further investigation.

The district court did not take up the defendants' invitation to initiate its own investigation of leaks at this point. Indeed, the defendants do not claim that there were any further leaks about grand jury information after July 2004. In short, as of the summer of 2004-after the initial indictment-the issue of whether government agents had violated Rule 6(e) grand jury secrecy rules by way of media leaks was essentially dead.

The issue of leaks was resurrected more than a year later by the defense in opposition to the government's motion for recusal. The district court, in its December 15, 2005 order denying recusal, followed the defense's lead and invoked the articles as a justification for its ongoing investigation into purported government violations of Rule 6(d) and, for the first time, opening an investigation into media leaks that had long since ceased.

B. *Misconduct Theory Involving Eavesdropping/"Grand Jury Shopping Charge" (Rule 6(d), Fed.R.Crim.P.)*

What actually started the phase of the investigation that has given rise to this mandamus petition was an anonymous post-indictment letter, purporting to be from a grand juror on the second grand jury, forwarded by defense counsel to the court on June 1, 2004. Before describing the letter, we set it in context, by describing the rules about grand jury operations at issue and the operation of the sequential grand juries here.

Defendants' theory is that the government eavesdropped on the deliberations of the second grand jury, in violation of Rule 6(d), and that the prosecution withdrew the case from the second panel after learning from the eavesdropping that an indictment was unlikely to be returned, and instead submitted it to the third grand jury, which ended up indicting the defendants.

Defendants alleged this eavesdropping violated Rule 6(d), which governs who may be present:

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.
(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

Fed.R.Crim.P. 6(d).

We describe the sequential grand juries here. Regular grand juries generally sit only for specified terms, capped at eighteen months unless the term is extended-and even then, the court may grant an extension for no more than six months.[FN6] ***53** *See* Fed.R.Crim.P. 6(g). In large cases such as this one, involving an alleged public corruption conspiracy lasting over a five-year period, it is not unusual to have several grand juries investigate.

> FN6. There are some exceptions not applicable here. For instance, the term of a special grand jury, as distinct from a regular grand jury constituted under Rule 6, may be extended by court order for up to thirty-six months, *see* 18 U.S.C. § 3331(a), and even longer in certain circumstances, *see id.* § 3333(e). Congress can also act to extend the term of a

> specific grand jury. *See United States v. Mitchell,* 397 F.Supp. 166, 170 (D.D.C.1974) (holding that Congress' statutory extension of grand jury's term was lawful and did not warrant dismissal of indictment), *aff'd sub nom. United States v. Haldeman,* 559 F.2d 31, 140 (D.C.Cir.1976) (en banc).

Grand Jury 00-3, which originally investigated this case, was impaneled in 2000 and discharged in 2002. The next panel, Grand Jury 02-1, started in February 2002 and was extended for six months in August 2003. The last time it heard evidence was on January 30, 2004. Grand Jury 02-1 was discharged near the end of February 2004, in the normal course, without being asked to vote on an indictment in this case. Starting in March 2004, the government presented evidence to Grand Jury 03-1, which had been impaneled in March 2003. That grand jury returned the indictment on April 8, 2004, and the later superseding indictment.

On June 1, 2004, in an *ex parte* filing, counsel for Vazquez-Botet submitted an anonymous letter he said he had received from someone claiming to have been a member of the second grand jury, Grand Jury 02-1, and making this accusation:

I ... worked in the "Supertubo" case; however, Assistant U.S. Attorney Mary K. Butler took the case away from us on February 24, 2004 upon learning that the vast majority of the grand jury had decided on a "NO TRUE BILL." How did AUSA Butler find out [about] our decision? Our theory ... [is] that in the area where Grand Jury members have coffee they had a microphone and listened in on our conversations, and I'll explain: while we were in the room and had reached our decision, not even ten minutes had gone by before they called and advised us that our grand jury duty service was over....

> ... [O]ne of the reasons why there was no cause for a "TRUE BILL" is that [prosecutors Guillermo Gil Bonar and Butler] did selective prosecutions in order to indict only members of the [NPP]....

The letter went on to attack the U.S. Attorney as biased and to describe specific pieces of testimony before the grand jury in this and other cases.

Neither Vazquez-Botet [FN7] nor the court informed the government of the request for an investigation. The district court took no action on the letter for over five months, and then, for reasons not stated at the time, initiated an unusual investigation. The government did not learn about the anonymous letter and its accusations, or the investigation, until a status conference held on March 14, 2005.

> FN7. Vazquez-Botet filed the anonymous letter *ex parte*, seeking initiation of an investigation, and the government had no chance to respond. Unfortunately, counsel did not alert the court to authority, such as *United States v. Thompson*, 251 U.S. 407, 413, 40 S.Ct. 289, 64 L.Ed. 333 (1920), contrary to his position. We need not decide whether counsel was obligated to do so. The effect of the omission, though, may have been to mislead the district court. *See In re United States*, 398 F.3d 615, 619 (7th Cir.2005) (per curiam) ("When making *ex parte* applications a litigant must alert the tribunal to authority, known to it, that may be inconsistent with its legal position, for there is no adversary to do that job.").

On November 9, 2004, without notifying the parties and without any simultaneous explanation of why the anonymous letter presented a plausible Rule 6(d) or (e) violation,***54** the district judge directed a magistrate judge to interview "the members of the grand jury whose deliberations were purportedly obstructed," as alleged in the letter. The court did not explain why presenting the third grand jury with the indictment amounted to an obstruction of grand jury deliberations. Nor did it direct the inquiry to a possible violation of secrecy obligations by the purported grand juror.

As ordered, the magistrate judge interviewed each of the grand jurors of the second grand jury separately-asking general questions such as whether they were aware of any "irregularities" and whether any government personnel had "impeded" their duties-and then submitted a sealed report dated January 28, 2005.

The reported results were unremarkable and certainly did not establish any reasonable suspicion of government misconduct. Several jurors expressed surprise that they had not voted on the Superaqueduct case on their last day, but they also mentioned the government's explanations that the government had to examine some documents and that new evidence needed to be investigated. Some expressed surprise that Grand Jury 03-1 was able to return an indictment in such a short time. And several spoke of having been cautioned-usually by the government attorneys-not to discuss the case in the break area, and to keep their voices down in the kitchenette, because they could be overheard by persons in the adjacent waiting room. Some said that the grand jury did not discuss the case outside the grand jury room, although one stated that the grand jurors discussed issues during the lunch time. No grand juror stated that the panel had ever deliberated and reached a decision in the instant case, contradicting the anonymous letter's assertion that "the vast majority of the grand jury had decided on a 'NO TRUE BILL.' " The magistrate judge concluded that the jurors' accounts were "alone inconclusive in relation to possible irregularities."

Neither side was made aware at that time of the investigation conducted by the magistrate judge or of the results. In our view, whether or not it was appropriate for the district judge to have ever ordered the magistrate judge to conduct an inquiry into eavesdropping, the results of the inquiry were such that the matter should have ended there.[FN8]

> FN8. Indeed, the magistrate judge's questioning of the grand jurors was not well suited to uncovering eavesdropping, because the grand jurors likely would have been unaware of any actual eavesdropping.

Meanwhile, the defense made two rounds of motions to compel the production of what it called "ministerial" grand jury records from all three grand juries. In the first round, initiated on June 1, 2004 (the same day Vazquez-Botet submitted the anonymous letter to the district court), the defense explained only that it needed the information to verify compliance with grand jury rules. The government, still unaware of the eavesdropping allegations, urged that the secrecy of the grand jury proceedings be maintained, and that information from any non-indicting grand jury was irrelevant. On November 9, 2004 (the same day as its separate sealed order initiating the magistrate judge's investigation), the district court largely granted the defense motion, even as to the first two, non-indicting, grand juries. The court found that the defense had made out a particularized need for disclosure, although it did not specify what that particularized need was. The court declined the prosecution's request that it first conduct an *in camera* review to see if there was a basis for an ***55** inquiry into improprieties. The defense (and eventually the government) received the requested information under seal.

The defense, on January 3, 2005, made another request for additional "ministerial" information from the grand juries. In various filings in this round of requests, the defense expressed to the government for the first time its theory of grand-jury shopping: that the defendants were prejudiced by the "switch" from the second to the third grand jury because the government was able to use the second as a "focus group" to hone its presentation to the third grand jury; and that the third grand jury may have been tainted by the media reports about the second grand jury.

We observe that those claims of prejudice neither make sense nor are they recognized by the law. The first, "focus group" notion, to the extent that it occurs, is an inevitable consequence of multiple grand juries. As to the "taint" from alleged media leaks, the government is free to transfer evidence from one grand jury to a later one. *See* Fed.R.Crim.P. 6(e)(3)(C). The prosecution had no incentive to use the media to leak information to the third grand jury from the second. Under the law, the government could present the third grand jury with the exact evidence presented to the second grand jury.

The government, which remained unaware of the anonymous letter, took two tacks in response to the second round of defense requests for grand jury records. First, it argued that the defense requests, particularly as to "grand jury shopping," were absolutely an improper subject of inquiry. Second, it nevertheless said it would explain why and how it chose to present the matter to a third grand jury, and did so via two sealed, *ex parte* affidavits to the court. The defendants were thus aware that the government had provided explanations to the court.

Still unsatisfied, the district court on February 3, 2005 ordered the disclosure of further grand jury records, adopting the same reasoning as it had articulated in the November 9, 2004 opinion and order: that the defendants had shown a particularized need, without explaining what that need was.

At a March 14, 2005 status conference, the district court made several rulings which ultimately led to the government's recusal motion. The court for the first time informed the government of the magistrate judge's secret investigation of the second grand jury and the anonymous letter which prompted it; it made the magistrate judge's January 28, 2005 report and the anonymous letter available; and it ordered an acoustical analysis of the grand jury area (as Vazquez-Botet had previously requested).[FN9] The court also vacated all motions deadlines.

FN9. The acoustical report, which the expert submitted on June 29, 2005 and which was made available to the parties on August 2, 2005, examined sound transmission between the grand jury room, an adjoining "waiting room" and "kitchen," and an adjacent "witness waiting room." No microphone was found. The report concluded that "[c]onfidential privacy is not maintained, particularly in situations with raised or loud voices in any of the rooms." This accords with the magistrate judge's report that the prosecution had specifically warned the grand jury of the problems and urged the grand jurors to keep their voices down in the adjacent rooms. We were informed at oral argument that remedial actions have been taken in response to these acoustical problems.

Defendants continued to press the theory of eavesdropping and grand jury shopping with a separate set of factual contentions. In August and December 2005, defendants submitted affidavits from two defense attorneys, both former ***56** Assistant U.S. Attorneys, in support of the suggestion that FBI agents had loitered in locations near the grand jury room in order to eavesdrop. [FN10] We note a few points. The affidavits placed the agents in these locations in April and August 2005, more than a year after the initial indictment here was returned. That provides no reasonable basis for an inference that the agents were improperly in the grand jury area or were eavesdropping at any time relevant to this case. The affidavits also established that defense lawyers, as well as prosecutors, were aware of the acoustical problems with the rooms of the grand jury area.

FN10. In the July 16, 2005 statement, submitted to the court on August 2, one lawyer stated that on April 20, 2005, he observed FBI Agents Vitousek and Hernandez "exiting a room next to the Grand Jury witness room" while the grand jury was in session and that the agents later reentered that room and again exited after remaining inside more than 30 minutes. The other lawyer's December 5, 2005 statement stated that in August 2005 Agent Vitousek was "inside the break room while testimony was going on inside the grand jury hearing room"; and that he "knew from experience that words spoken inside the grand jury hearing room are audible and intelligible to persons in the break room," even with the intervening door closed.

III.

We have jurisdiction to consider the petition. We review all issues of law de novo. *In re United States,* 426 F.3d 1, 4 (1st Cir.2005).

[1][2] Subject to some exceptions, an applicant for the writ normally "must show both that there is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld." *In re United States,* 158 F.3d 26, 30 (1st Cir.1998) (internal quotation marks omitted) (quoting *In re Cargill, Inc.,* 66 F.3d 1256, 1260 (1st Cir.1995)); *accord, e.g., In re Martinez-Catala,* 129 F.3d 213, 221 (1st Cir.1997). The irreparable harm standard is viewed in light of the fact that once the case does get to trial "the government has no ready way to appeal if there is an acquittal and no standing to appeal if there is a conviction." *In re United States,* 426 F.3d at 5.

The government seeks three forms of relief: that the district court be ordered to stop its investigation into potential prosecutorial misconduct involving the grand jury, that the stay of trial be lifted, and that the district court judge be ordered to recuse himself from further involvement in this case.

[3] The strict standards for issuance of mandamus are relaxed when the government seeks a judge's recusal in a criminal case, "[b]ecause of the government's inability to press an end-of-case appeal." *In re United States,* 158 F.3d at 31; *see also In re Boston's Children First,* 244 F.3d 164, 167 n. 6 (1st Cir.2001). This court has reviewed such decisions under the abuse of discretion standard, rather than the more exacting standard for mandamus. *See In re United States,* 158 F.3d at 31.

[4][5] Furthermore, under the recusal standard, any reasonable doubts about the partiality of the judge ordinarily are to be resolved in favor of recusal. Under 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." While recognizing that the "challenged judge enjoys a margin of discretion," this court has repeatedly held that "doubts ordinarily ought to be resolved in favor of recusal." *In re United States,* 158 F.3d at 30; *see also United States v. Snyder,* 235 F.3d 42, 46 (1st Cir.2000). Under ***57** § 455(a), this court asks whether an objective, reasonable member of the public, "fully informed of all the relevant facts, would fairly question the trial judge's impartiality." *In re United States,* 158 F.3d at 31 (emphasis omitted).

IV.

Analysis of the government's requests depends in large part upon our assessment of the allegations of prosecutorial misconduct in the grand jury proceedings and the power of the district court to respond to them. Whether the investigation should be terminated depends on whether there is a sufficient reason to suspect that there were Rule 6 violations by the government; we conclude there is not. The propriety of the stay of trial depends on the validity of the district court's reasoning that it needed to do so. This reasoning, to the extent the court justified the stay on this ground, is based on a legal error; further, as a factual matter a remedy of dismissal has never realistically been available in this case.

A. *The Relationship Between the District Court, the Grand Jury, and the Prosecution*

The grand jury, classically, is meant to be an independent check on the ability of the government to bring criminal charges against individuals. It "serv[es] as a kind of buffer or referee between the Government and the people," *United States v. Williams*, 504 U.S. 36, 47, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), "protect[ing] ... citizens against unfounded criminal prosecutions," *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The grand jury also has another role, as an investigatory and accusatory body.

[6] The federal grand jury "has not been textually assigned" to any of the three branches of federal government. *Williams*, 504 U.S. at 47, 112 S.Ct. 1735. The institution is not mentioned in the body of the Constitution, but in the Bill of Rights. *Id.*; U.S. Const. amend. V. It is thus a "constitutional fixture in its own right"; it is not an arm of the district court. *Williams*, 504 U.S. at 47, 112 S.Ct. 1735 (internal quotation marks omitted) (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.1977)). Indeed, "the whole theory of its function is that it belongs to no branch of the institutional Government." *Id.* Thus, the grand jury remains functionally and constitutionally "at arm's length" from the judicial branch. *Id.; see also Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 15 (1st Cir.2000).

[7] The grand jury does not operate completely without judicial oversight. While a court's ability to define judicially created rules of conduct before the grand jury has been sharply cabined by the Supreme Court, *Williams*, 504 U.S. at 55, 112 S.Ct. 1735, a court may still remedy misconduct which violates "one of those 'few, clear rules which were carefully drafted and approved by [the Supreme] Court and by Congress to ensure the integrity of the grand jury's functions.' " *Id.* at 46, 112 S.Ct. 1735 (quoting *Mechanik*, 475 U.S. at 74, 106 S.Ct. 938 (O'Connor, J., concurring in the judgment)). Rules 6(d) and (e) contain such rules. *Id.* at 46 n. 6, 112 S.Ct. 1735.

[8] The inherent supervisory authority over grand juries of a court is well recognized.[FN11] *See* ***58***McNabb v. United States,* 318 U.S. 332, 340-41, 346-47, 63 S.Ct. 608, 87 L.Ed. 819 (1943). "[I]n the exercise of supervisory powers, federal courts may, *within limits,* formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting,* 461 U.S. 499, 505, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (emphasis added).

> FN11. *See generally* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts,* 84 Colum. L.Rev. 1433 (1984). As Beale notes, unlike this case, "most of the Court's supervisory power decisions have announced general rules of procedure and evidence for federal criminal proceedings." *Id.* at 1449.

[9] Unlike in many foreign countries, the federal courts in the American criminal justice system generally do not have the power to act as investigators or prosecutors of misconduct, including misconduct by government prosecutors. *See In re United States,* 345 F.3d 450, 452 (7th Cir.2003). Rather, such powers are usually exercised by the grand jury and the executive branch. Investigatory and prosecutorial decisions are usually "made outside the supervision of the court." *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 807, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987).

Here, both Rule 6 and the court's inherent supervisory authority undoubtedly provided some authority to investigate misconduct as to the grand jury proceedings, subject, of course, to the broader constitutional principle of the separation of powers. *See In re Grand Jury Subpoena of Rochon,* 873 F.2d 170, 174 (7th Cir.1989)

("[A]lthough the grand jury is subject to a supervisory power in the courts, aimed at preventing abuses of its processes or authority, the separation-of-powers principle imposes significant limits on it." (internal quotation marks and citation omitted) (quoting *Chanen,* 549 F.2d at 1313; *United States v. Gatto,* 763 F.2d 1040, 1046 (9th Cir.1985))).

This court has been mindful of these separation of powers constraints. It has rejected an attempt to have federal courts use their inherent supervisory authority to disqualify a federal prosecutor who had otherwise been properly appointed by the Executive branch. *See United States v. Silva-Rosa,* 275 F.3d 18, 21-22 (1st Cir.2001); *see also In re Grand Jury Subpoena of Rochon,* 873 F.2d at 174-76 (holding that the district court violated the separation of powers doctrine when it used its inherent supervisory authority to disqualify the United States Attorney from participating in a grand jury investigation, when there was no conflict of interest violating a "specific constitutional provision, statute, or rule").

[10] These constraints mean that there must be some reasonable basis for a district court to launch an inquiry into claims that the prosecutor has engaged in grand jury misconduct. Some courts have adopted a rule that a prima facie case must be shown first.[FN12] We are reluctant to use such a test. The "prima facie case" test is used in many different ways and means many different things. Further, a formulaic approach helps little: the varieties of possible misconduct and the factual variations are myriad. Depending on context, mere suspicion may be enough to cause further inquiry into violation of a well-established rule, particularly where infringement of a defendant's constitutional rights is potentially involved.

FN12. *See, e.g., United States v. Rioux,* 97 F.3d 648, 662 (2d Cir.1996); *Barry v. United States,* 865 F.2d 1317, 1321 (D.C.Cir.1989); *Blalock v. United States,* 844 F.2d 1546, 1551 (11th Cir.1988); *see also Finn v. Schiller,* 72 F.3d 1182, 1187-91 (4th Cir.1996).

In addition to the question of whether investigation is warranted, there are limits on who should investigate and how the investigation should be done. Here the ***59** court used both the traditional means, authorized by the rules, of requiring the government to disclose information and the non-traditional means of requiring a magistrate judge to question jurors. The court may also refer matters for investigation by law enforcement officers. If, for example, there is a basis to believe there has been a crime committed, such as obstruction of justice, *see* 18 U.S.C. § 1503, or criminal contempt, outside the court's presence, occasioned by misconduct before the grand jury, then the district court should ordinarily refer the matter to the Department of Justice for prosecution. *See In re United States,* 398 F.3d 615, 618 (7th Cir.2005) (per curiam) ("In the rare situations when a prima facie case of criminal contempt has been made out, and the contempt is not committed in the judge's presence (and thus amenable to summary disposition), the judge *must* turn the matter over to a prosecutor rather than assume an inquisitorial role inappropriate to the Judicial Branch." (emphasis added)); Fed.R.Crim.P. 42(a).

Further, Rule 6(e)'s criminal statutory analogue, 18 U.S.C. § 1508, makes it a crime to knowingly and willfully record (or attempt to record) the proceedings of any grand jury while it is deliberating or voting, and to listen to or observe (or attempt to listen to or observe) the proceedings of any grand jury while it is deliberating or voting.

If there were a basis for believing there was a violation of 18 U.S.C. § 1508, the matter could have been referred to a different branch of the Department of Justice for investigation and prosecution. Referral for prosecution has the effect of reducing the involvement of the district judge and thus the risk of presenting the appearance that the court has improperly become an investigator and prosecutor of the parties before it. Here, the district court chose to conduct its own investigation in private.

There are also limits on what may be investigated. As emphasized in *Williams,* "[b]ecause the grand jury is an institution separate from the courts, *over whose functioning the courts do not preside,* we think it clear that, as a general matter at least, no such 'supervisory' judicial authority exists [to prescribe standards of prosecutorial conduct before the grand jury]." 504 U.S. at 47, 112 S.Ct. 1735 (emphasis added). *Williams* involved a claim of misconduct based on the government's failure to disclose exculpatory evidence to the grand jury. *See id.* at 37-38, 112 S.Ct. 1735. The Court also stated that

> any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself.

Id. at 50, 112 S.Ct. 1735 (citation omitted). The district court's investigation of "grand jury shopping" invokes this concern about altering the traditional relationships.

The district court's remedial powers are also limited. Some remedies are explicitly authorized by the Rules. For example, Rule 6 provides that the court may order an exception to grand jury secrecy at the request of a defendant "who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed.R.Crim.P. 6(e)(3)(E)(ii).

Rule 6 also provides the court the power to find a violator in contempt for knowing ***60** violations of Rule 6(e) secrecy rules.[FN13] Fed.R.Crim.P. 6(e)(7). The advantage of contempt as a remedy for misconduct by government agents is that the remedy focuses, as it should, "on the culpable individual rather than granting a windfall to the unprejudiced defendant." *Bank of Nova Scotia v. United States,* 487 U.S. 250, 263, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). Dismissal of the indictment poses exactly such a risk of granting a windfall to the unprejudiced defendant, at the expense of the public interest.

> FN13. There is a debate, not pertinent here, about whether the contempt power applies to all of Rule 6 or only to violations of Rule 6(e). Rule 6(e)(7) provides broadly that "[a] knowing violation of Rule 6 ... may be punished as a contempt of court." As noted in the Advisory Committee Notes to the 2002 Amendments, "the scope of the contempt sanction in Rule 6 is unsettled." The Notes suggest that the contempt provision is "seemingly ... misplaced in subdivision (e)," because of "its apparent application to the entirety of the Rule." Fed.R.Crim.P. 6 advisory committee's notes (2002 amendments).

[11][12][13] Rule 6 does not itself define when an indictment may be dismissed due to "a matter that occurred before the grand jury." But those circumstances are very rare. "[A]s a general matter, a district

court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Id.* at 254, 108 S.Ct. 2369. Where a court is asked to dismiss an indictment before the conclusion of trial, the standard of prejudice is a high one: that "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 256, 108 S.Ct. 2369 (quoting *Mechanik,* 475 U.S. at 78, 106 S.Ct. 938 (O'Connor, J., concurring in the judgment)). We wish to be clear that at no point has there been any showing that there was any impropriety that "substantially influenced" the decision of the third grand jury to indict.[FN14] Indeed, the limit on the court's power to dismiss an indictment is so strong that, once a case goes to trial, a verdict by a petit jury "render[s] harmless any conceivable error in the charging decision" to indict. *Mechanik,* 475 U.S. at 73, 106 S.Ct. 938. When and whether these limits on the court's authority may be invoked is highly dependent on the facts of each situation.

> FN14. There is, for example, no claim as in other cases that flagrantly inflammatory and improper comments by the prosecutor were part of a pattern of conduct that substantially impaired the ability of the grand jury to review the case against the accused impartially and independently. 2 Beale et al., *Grand Jury Law and Practice* § 9:2, at 9-10 (2001).

B. *Investigation into Alleged Violations of Grand Jury Rules*

The district court justified its past and ongoing investigations by making findings that there were adequate showings that Rules 6(d) and (e) had been violated.

1. *Grand Jury Leaks*

[14] There was no error in the district court's initial actions in response to leaks to the media, namely, asking the U.S. Attorney to have the FBI and DOJ investigate the matter.[FN15] The protective order ***61** issued on May 7, 2004, applicable to both sides, was also proper. However, the court's actions in launching an investigation of the government as a source of the pre-indictment leaks, more than a year after the leaks had stopped and after a decision had been made de facto not to investigate leaks further, were unjustified in this context.

> FN15. Similarly, the district court had authority to keep under seal such portions of its response to motions and its investigation "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed.R.Crim.P. 6(e)(6); *see also* Fed.R.Crim.P. 6(e)(5) (court "must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury"); *In re Newark Morning Ledger Co.*, 260 F.3d 217 (3d Cir.2001).

[15] The purposes served by the grand jury secrecy rule did not justify the court's actions. These purposes include encouraging prospective witnesses to come forward and testify "fully and frankly" to the grand jury, without improper influence in the form of threats or inducements; preventing targets of grand jury investigation from being alerted to the scrutiny and fleeing, or attempting to influence grand jurors or witnesses; and assuring that those who are investigated but not indicted are saved from "public ridicule." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19, 99 S.Ct.

1667, 60 L.Ed.2d 156 (1979). The issue is quite different when the grand jury, as here, has returned the indictment. *See id.* at 218-19, 222 (interests served by grand jury secrecy are reduced after indictment); 1 Wright, *Federal Practice and Procedure* § 106, at 365-66 (3d ed.1999). Once the indictment is public, these concerns are largely gone.

We disagree that there was, at the time of the district court's December 15, 2005 justification, a basis for investigating further. The court found that the media reports established there were leaks; that the articles indicated that the source of the information was someone covered by the secrecy rule, such as "a federal source"; and that the nature of the leaked information indicated that the government was the source. The court said it must assume that all statements in the news reports were correct, rejecting as immaterial the government's point that the articles were inaccurate in part and speculative in part.[FN16] The court concluded that the "inference of government misconduct" remained unrebutted.

> FN16. "[S]tatement[s] of opinion as to an individual's potential criminal liability" and discussion of "actions taken by government attorneys or officials," such as "a recommendation by the Justice Department attorneys to department officials that an indictment be sought against an individual," do not "reveal any information about matters occurring before the grand jury." *In re Grand Jury Investigation* (*Lance*), 610 F.2d 202, 217 (5th Cir.1980); *see also id.* at 217 n. 5 ("Several of the articles ... discuss actions taken by the Justice Department," such as when the Department will decide whether to seek an indictment, and "such disclosures do not violate Rule 6(e).").

While these factors may have justified the issuance of the May 7, 2004 protective order, they did not thereafter, absent new information, justify the further investigation of *government* misconduct, justified by the district court for the first time on December 15, 2005. The district court as well had apparently concluded there was no basis for further action after the May 7, 2004 protective order, and for good reason. Most importantly, the government had twice referred the matter to independent DOJ officials for investigation, and they had found nothing. Further, the indictment had issued, minimizing any harm. Moreover, there were a number of possible sources, particularly given the acoustical problems with the grand jury room. And not all individuals with knowledge of matters occurring before a grand jury are forbidden from disclosing their knowledge.[FN17]

> FN17. Indeed, the rule on grand jury secrecy, Rule 6(e)(2)(A), is express that the court may not impose (and so sanction for noncompliance with) an obligation of secrecy on any person except in accordance with Rule 6(e)(2)(B). Most notably, witnesses who have been called to testify before the grand jury are not covered by Rule 6(e)(2)(B).

***62** 2. *Eavesdropping and the "Grand Jury Shopping" Theory*

[16] We separate the idea of eavesdropping, which could violate both Rule 6(d) and a criminal statute, 18 U.S.C. § 1508, from the idea of grand jury shopping.

By limiting the persons who may be present when the grand jury is in session, Rule 6(d) protects the secrecy of the grand jury and avoids possible undue influence on the grand jury. *Mechanik*, 475 U.S. at 74-75, 106 S.Ct. 938 (O'Connor, J., concurring in the judgment). As to government attorneys, the limits in the Rule apply only when the grand jury is deliberating or voting. Since the second grand jury was never asked to vote on the indictment, it is difficult to see why Rule 6(d)'s purpose of avoiding undue influence is at stake here. Certainly, had there been improper eavesdropping by the government, the proper remedy would have been some sort of sanction against the agents involved. There was, in the end, no evidence to support even the eavesdropping theory.

The district court justified its continuing investigation, even after the magistrate judge's report, by finding sufficient indicia of eavesdropping on the second grand jury based on: first, the anonymous note from the purported member of the second grand jury; second, the statements of a few members of the second grand jury that they were surprised about not being able to vote on whether to indict; third, the acoustical study, which found that "confidential privacy is not maintained" and so "establish[ed] that the government had the opportunity to eavesdrop on the Grand Jury from adjacent rooms"; and fourth and fifth, two affidavits which the defendants had submitted describing the sighting of two FBI agents in the vicinity of the grand jury more than a year after the indictment was returned.

The anonymous letter, which contained only speculation and was of dubious provenance, was itself insufficient to launch a secret magistrate judge investigation into claimed eavesdropping by the government. After the magistrate judge's investigation, there was no factual basis to proceed further.[FN18] Since the second grand jury was never asked to indict, these jurors' comments are irrelevant to the criminal trial. The acoustical examination and report showed there was no "hidden microphone," as alleged in the anonymous letter. An opportunity to eavesdrop was, regrettably, given to anyone in the vicinity, including the defense bar. The affidavits supplied by the defense, that government agents had been seen in the vicinity, dealt with events more than a year after the initial indictment.

> FN18. The district court's December 15, 2005 opinion also invokes a local rule, 106(c), as part of its broad "grand jury secrecy" investigation. The rule adds nothing to the analysis. And obviously, the prosecutors and their agents had no need to eavesdrop to ascertain the identity of witnesses or members of the grand jury.

Much more seriously, there was no basis in the law for the defendants to use their eavesdropping allegation either to question the government's use of a third grand jury or to seek dismissal of the indictment. The district court justified its inquiry into the grand jury shopping theory, in refusing to recuse itself, saying that:

[t]hough the government is correct in its contention that it was free to submit the case to a second grand jury even if the first was not willing to indict, the argument is nonetheless off the mark in the present context. Although the government***63** is unquestionably endowed with wide discretion in its decision whether to submit a case to a particular grand jury, it is unquestionable that prosecutors are bound by the Federal Rules of Criminal Procedure in their actions. Thus, while the government could have decided not to seek an indictment from Grand Jury 02-1 for any reason, or no reason at all, it could not have reached its decision by means of a Rule 6(d) violation.

This reasoning does not support the court's actions.

[17] It is doubtful the district court had any basis, on these allegations, to investigate the use of a third grand jury, since Rule 6 gives the government exactly that authority. Further, "federal judges may not insist that prosecutors reveal deliberative or pre-decisional materials," but must instead "review outputs." *In re United States,* 398 F.3d at 618. Rule 6 expressly authorizes the prosecutor's disclosure of matters presented to one grand jury to successive grand juries. *See* Fed.R.Crim.P. 6(e)(3)(C); *United States v. Contenti,* 735 F.2d 628, 631 n. 1 (1st Cir.1984) (explaining that "[i]t is not in the public's interest to expect each new grand jury to start all over rather than accept the work product of the prior grand jury").

As one commentator has noted, "[t]he longstanding federal rule is that resubmissions [of an indictment after one grand jury refuses to indict] are permissible, without court approval, even when the prosecutor presents no additional evidence to the second grand jury." 4 LaFave et al., *Criminal Procedure* § 15.2(h), at 284-85 (2d ed.1999); *see also Williams,* 504 U.S. at 49, 112 S.Ct. 1735. The reason was stated by the Supreme Court in *United States v. Thompson,* 251 U.S. 407, 40 S.Ct. 289, 64 L.Ed. 333 (1920): "[T]he power and duty of the grand jury to investigate ... is continuous and is therefore not exhausted or limited by adverse action [previously] taken by a grand jury or by its failure to act...." *Id.* at 413, 40 S.Ct. 289; *see also Ex parte United States,* 287 U.S. 241, 250-51, 53 S.Ct. 129, 77 L.Ed. 283 (1932). We see nothing to suggest that Rule 6(d) was meant to cabin this historic power of the prosecution, especially where, as here, the second grand jury did not even reject the indictment-it was not asked to vote.

Since Rule 6 authorizes the prosecution's use of sequential grand juries, the district court's investigation ran the risk of violating the principle of separation of powers by interfering with the constitutional prerogatives of the executive branch and of the grand jury. *See Williams,* 504 U.S. at 48, 112 S.Ct. 1735; *see also United States v. Bolden,* 353 F.3d 870, 877 (10th Cir.2003) ("[The Constitution] vests the Executive with substantial discretion in choosing when and how to prosecute cases."); *In re United States,* 345 F.3d at 452. We need not decide whether there can be some form of impermissible grand jury shopping which would warrant court inquiry. What is dispositive for present purposes is that whether or not the district court ever had any authority to question the government's reasons for submission to a third grand jury, the government provided those reasons to the district court under seal, and the reasons were entirely legitimate and reasonable. The court had no basis to look behind them.

C. *The Delay of Trial*

[18] The district court justified its delay of the trial, as we infer from its stated reasons, on the theory that if it did not stay the trial, under *Mechanik,* a conviction after trial by the petit jury would cure any error in the indictment, and that would deprive the court of its power to dismiss the indictment. If this was the intent of the court, it is based on a clear ***64** error of law and the stated premises are backwards. Matters of a court's own disciplinary power, which could be easily handled by other remedies if there were Rule violations, may not be elevated above the public interest in trial of criminal defendants.

[19] Since none of the irregularities alleged here could have resulted in dismissal of the indictment, as there was no demonstrable prejudice to the defendants, there was no reason to stay the trial. The

defendants' only claim of prejudice is that the third grand jury was somehow tainted by leaked information from the second grand jury. It is doubtful that adverse publicity claimed to affect a grand jury states a basis for dismissal.[FN19] Here, this argument falls flat, since the government can cure any misinformation by re-presenting information from one grand jury to another. Dismissal of the indictment is not appropriate when secrecy violations "could not have affected the charging decision." *Bank of Nova Scotia,* 487 U.S. at 259-60, 108 S.Ct. 2369. There was no viable claim that the charging decision by the third grand jury was "substantially influenced" by any eavesdropping.

> FN19. One circuit court has held that prejudicial publicity does not provide a basis for dismissing the indictment, saying that the concern over adverse publicity is how it affects the ensuing trial, and not the grand jury proceeding. *United States v. Waldon,* 363 F.3d 1103, 1109 (11th Cir.2004) (per curiam). An earlier decision of this court was similarly hesitant to dismiss an indictment on grounds of allegedly prejudicial publicity. *See United States v. Brien,* 617 F.2d 299, 313 (1st Cir.1980) (noting that "the taint of a grand jury will be purged by the deliberations of an untainted petit jury" and that "there is no contention here of a publicity prejudiced petit jury").

Further, the court's apparent reasoning was that, on the basis of alleged grand jury misconduct, it could delay the trial. This ran afoul of the public interest in having the trial of the case promptly commence. The Supreme Court has explicitly discouraged the delay and disruption in criminal proceedings caused by judicial review of claims of prosecutorial misconduct. *See* 2 Beale et al., *Grand Jury*

Law and Practice § 9:1, at 9-3 to 9-4 (2001). That was the theme in *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), reinforced later in *Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561. *Costello* announced the rule that "[a]n indictment returned by a legally constituted and unbiased grand jury, ... if valid on its face, is enough to call for trial of the charge on the merits." 350 U.S. at 363, 76 S.Ct. 406. The Court noted that the hearing of challenges to the sufficiency of the evidence presented to the grand jury "would result in interminable delay but add nothing to the assurance of a fair trial." *Id.* at 364, 76 S.Ct. 406.

This court, too, has expressed the same concerns about delay. We have invalidated a local rule promulgated by a district court, when the court impermissibly interfered with grand jury secrecy. *Stern,* 214 F.3d 4. In doing so, we noted that one of the vices of the rule was its "potential as an incubator for delay." *Id.* at 16 (citing *United States v. R. Enters., Inc.,* 498 U.S. 292, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991)). Delay of criminal trials imposes costs not only on the government, but on society: "delay may compromise society's 'interest in the prompt administration of justice,' and impede accomplishment of the objectives of deterrence and rehabilitation." *Mechanik,* 475 U.S. at 72, 106 S.Ct. 938 (quoting *Hasting,* 461 U.S. at 509, 103 S.Ct. 1974).

V.

Recusal

[20] We return to the question of whether these events provide a basis for ***65** recusal under 28 U.S.C. § 455(a), under the standards described earlier.

A. *Timeliness*

The district court denied the recusal motion on two grounds: it was too late and it was without merit. *See In re United States,* 158 F.3d at 34 ("the timeliness of the government's recusal motion" is "a proper subject for scrutiny"); *In re United States,* 666 F.2d 690, 694 (1st Cir.1981) (a motion for disqualification under § 455(a) must be timely filed). This court has not stated a standard of review for a holding by a district court that a recusal motion is untimely, but has viewed the issue as a preliminary one and engaged in our own review of whether there was a calculated withholding of a recusal motion such that we would deem it waived. *See In re Abijoe Realty Corp.,* 943 F.2d 121, 126-27 (1st Cir.1991); *In re United States,* 666 F.2d at 694. Under any standard, we reject the preliminary argument that the recusal motion came too late.

[21] A motion to recuse is a very serious matter and must have a factual foundation; it may take some time to build the foundation. At the same time, courts will reject what appear to be strategic motions to recuse a judge whose rulings have gone against the party. That is why, in general, a party must raise the recusal issue "at the earliest moment after [acquiring] knowledge of the [relevant] facts." *In re Abijoe Realty Corp.,* 943 F.2d at 126 (alterations in original) (internal quotation marks and emphasis omitted) (quoting *United States v. Owens,* 902 F.2d 1154, 1156 (4th Cir.1990)).

The government's motion was timely. The September 2005 trial date was not postponed indefinitely until August 30, 2005. The government's recusal motion was filed on October 3, 2005, one month later. The motion was filed soon after it became clear that the court not only was going to continue its investigation, but also was going to delay the trial of the case. The recusal motion here was based on an accumulation of events, and the government did not waive its claim by filing when it did.

B. *Merits of the Recusal Claim*

1. *Claims of Actual Bias*

[22] Before turning to the heart of the argument for recusal, we first dispose of the government's argument that Judge Pérez-Giménez was actually biased against it. The government argues there were two proofs of actual bias: first, that the judge was predisposed against a key witness in the government's case, FBI Special Agent Ivan Vitousek, and second, that the judge was politically biased against prosecutions of former NPP officials. The government uses two incidents to support its claim of actual bias.

First, in moving for recusal, the government attached an affidavit from FBI Special-Agent-in-Charge (SAC) Fraticelli, which stated that on or about June 19, 2004, while he was in "transition" to the SAC position, he was summoned to a meeting with then-Chief Judge Laffitte and Judge Pérez-Giménez in Judge Laffitte's chambers. Fraticelli reported that Judge Laffitte expressed concern about recent media leaks in *several* high-profile cases, and "[b]oth federal judges stated that ... [Agent] Vitousek was responsible," noting that the leaks were more prevalent in cases for which he was the case agent.

This filing provoked the filing by Vazquez-Botet on December 12, 2005 of an affidavit from Judge Laffitte, as well as Judge Pérez-Giménez' response in the December 15, 2005 order. Judge Laffitte and Judge Pérez-Giménez deny having been so ***66** blunt as to say Agent Vitousek was responsible, and Judge Laffitte says he only pointed out the coincidence that leaks were more prevalent in cases in which Vitousek was case agent. Judge Laffitte did say that before the meeting, Judge Pérez-Giménez informed him that the leak investigation "pointed to ... Vitousek." Judge Pérez-Giménez does not address this point.

When Fraticelli questioned Vitousek, Vitousek denied being the source of any leak, and Fraticelli reported that fact back to Judge Pérez-Giménez in June 2004, as well as the government's position that any leaks did not come from the FBI. No action was taken as to the allegations against Agent Vitousek thereafter. There has never been a *finding* that Agent Vitousek was a source of leaks. Far from proving actual bias, this episode shows responsible actions by two judges legitimately concerned about maintenance of grand jury secrecy in their district.

The government also argues that there is other evidence of a predisposition by the district judge against Agent Vitousek, and indeed, against the government in criminal prosecutions of NPP officials. That evidence, it says, is found in our opinion in *United States v. Rivera Rangel,* 396 F.3d 476 (1st Cir.2005). In *Rivera Rangel,* another political corruption case, the jury returned a verdict of guilty against an NPP official who had been the executive assistant to the governor. The same judge as in this case set aside the verdict and alternatively ruled that the defendant was entitled to a new trial because government agents (including Agent Vitousek) had improperly failed to produce exculpatory evidence. This court held that both actions were in error, reversed, and remanded. *Id.* at 482-86. The court did not, however, base its reversal on any demonstration of actual bias.

Pursuant to our statutory power to reassign "as may be just under the circumstances," 28 U.S.C. § 2106, we also instructed in the mandate that the case, on remand, be reassigned to a different judge. That statutory standard, again, does not depend on there being actual bias. *See, e.g., Conley v. United States,* 323 F.3d 7, 15 (1st Cir.2003) (en banc) (remanding to new judge, despite having "no doubt about the good faith of the district judge," where remanding to original judge would put him "in a very awkward position"); *Mawson v. United States,* 463 F.2d 29, 31 (1st Cir.1972) (per curiam) (ordering that on remand a new judge be assigned "both for the [original] judge's sake, and the appearance of justice").

Again, we think the prosecution quite overreaches in its contention that the *Rivera Rangel* case somehow establishes actual bias in this case by the district judge.

2. *Recusal Under 28 U.S.C. § 455(a)*

[23] "The judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so." *Liteky v. United States,* 510 U.S. 540, 553 n. 2, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Subsection (a) of 28 U.S.C. § 455 "requires recusal in some circumstances where subsection (b) does not." *Id.* The recusal statute, by its terms, operates both ways, whether the appearance is of partiality in favor of a defendant or in favor of the government. Partiality in favor of the government may raise a defendant's due process concerns. *See In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Just as there is a prohibition against a judge "adjudicating a case where he was also an investigator for the government," *Johnson v. Carroll,* 369 F.3d 253, 260 (3d Cir.2004), there is a prohibition against a judge adjudicating a case where he has become an investigator against the

government.

***67** [24][25] The defendants rely heavily on the principle that a judge's rulings and statements in the course of proceedings before him or her rarely provide a basis for recusal under § 455(a). *See Liteky,* 510 U.S. at 555, 114 S.Ct. 1147. That principle applies even to misjudgments: a judge's erroneous rulings will not ordinarily be enough to warrant a writ of mandamus to the judge to recuse himself or herself.[FN20] *See In re Boston's Children First,* 244 F.3d at 168 n. 7; *see also Liteky,* 510 U.S. at 556, 114 S.Ct. 1147 ("ordinary admonishments (whether or not legally supportable) to counsel and to witnesses" were inadequate to establish bias or prejudice where they "occurred in the course of judicial proceedings, and neither ... relied upon knowledge acquired outside such proceedings nor ... displayed deep-seated and unequivocal antagonism that would render fair judgment impossible") (emphasis omitted).

> FN20. It is sometimes said, as a corollary of the principle that a judge's decisions on matters before him or her ordinarily cannot result in recusal, that the party must show an "extrajudicial" source for the apparent bias. *See Liteky,* 510 U.S. at 551, 114 S.Ct. 1147 ("[M]any opinions have [suggested] that 'extrajudicial source' is the only basis for establishing disqualifying bias or prejudice."). There is no such absolute rule: an "extrajudicial source" is not the exclusive basis for establishing disqualifying bias or prejudice. *See id.; see also id.* at 554-55, 114 S.Ct. 1147.

[26] Here, though, the government's complaints focus on the delay of trial due to the court's conducting an investigation of the prosecution, which investigation is ancillary to its rulings in the main criminal

case. This petition is not about a "judge's ordinary efforts at courtroom administration," *Liteky,* 510 U.S. at 556, 114 S.Ct. 1147, nor about "judicial remarks ... that are critical" of counsel or a party, *id.* at 555, 114 S.Ct. 1147. A judge's investigation of a prosecutor's office under the label of government misconduct as to the grand jury is not just a ruling in the ordinary course. It poses the risk that the line will be crossed "between executive and judicial roles, and between the formulation and evaluation of positions in litigation." *In re United States,* 398 F.3d at 618. This fact means that recusal is not precluded here by the extrajudicial source rule.

[27] Recusal motions are difficult from the point of view of both the district court judge and the reviewing appellate court. The trial judge has a duty not to recuse himself or herself if there is no objective basis for recusal. *See Snyder,* 235 F.3d at 45-46 & n. 1; *Blizard v. Frechette,* 601 F.2d 1217, 1221 (1st Cir.1979); *In re Union Leader Corp.,* 292 F.2d 381, 391 (1st Cir.1961). A district judge, faced with a recusal motion, is also being asked to step outside herself or himself and take the objective view of an informed outsider. That is difficult for even a saint to do. Moreover, the trial judge has been in the heat of the proceedings, and objectivity, though sought, may be elusive. That is especially so when the proponent of the motion to recuse argues that there is actual bias on the judge's part.

[28] For our part, an appellate court has no wish to encourage strategic moves by a disgruntled party to remove a judge whose rulings the party dislikes. "[T]he disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to

obtain a judge more to their liking." *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir.1989).

***68** The statutory standard we apply here, that there is no reasonable basis to question the impartiality of the judge, has high aspirations. The standard does not depend on a showing of actual bias. It requires instead that there be no reasonable question, in any informed person's mind, as to the impartiality of the judge. Under § 455(a), "what matters is not the reality of bias or prejudice but its appearance," and "[q]uite simply and quite universally, recusal [is] required whenever 'impartiality might reasonably be questioned.' " *Liteky*, 510 U.S. at 548, 114 S.Ct. 1147 (quoting 28 U.S.C. § 455(a)); *see also In re Boston's Children First*, 244 F.3d at 167; *In re United States*, 158 F.3d at 31. "[J]ustice must satisfy the appearance of justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (internal quotation marks omitted) (quoting *In re Murchison*, 349 U.S. at 136, 75 S.Ct. 623). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Id.* at 865, 108 S.Ct. 2194.

[29] The appellate court is more removed and hence more objective. We are struck by the district court's insistence, in the course of denying the recusal motion, not only on continuing an investigation that had already yielded results not showing any government wrongdoing, but also on resuscitating leak claims that had been dormant for over a year. We are struck by its orders that the government disclose yet further information as to the return of the indictment by the third grand jury, even when the government had already provided explanations, despite there being little basis in the law or in fact for the inquiry. Of particular concern is the decision

by the district court to delay the trial, apparently in order to reserve the power to dismiss the indictment, when there was never any realistic basis to consider dismissal of the indictment as a remedy.

We conclude that the cumulative effect is to establish a reasonable basis for questioning the impartiality of the district court judge. In light of that conclusion, we order recusal of the present district judge and that the case be assigned on remand to a different judge.[FN21] We do so with no criticism of the judge, who was faced with a series of difficult issues. We also order that on remand the case be promptly set for trial. And, in the absence of any new evidence of government misconduct under Rule 6, we order termination of the present investigation. *See In re United States,* 398 F.3d at 619-20.

> FN21. The government does not invoke our power under 28 U.S.C. § 2106 to order that the case be reassigned on remand to another judge, and no party has briefed the issue. We do not address the point.

VI.

Conclusion

The petition for mandamus is *granted.* The district judge is ordered to recuse himself. On remand, this criminal case is promptly to be reassigned to a different judge and set for trial. The investigation into government misconduct in the grand jury proceedings shall, in the absence of any new evidence of misconduct, be terminated. So ordered.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff,

CR. NO. 04-160 (PG)

v.

(1) RENE VAZQUEZ-BOTET,
(2) MARCOS MORELL-CORRADA,
Defendants.

OPINION & ORDER

Before the Court are the government's motions to recuse and to stay (Docket Nos. 197, 198 and 200). For the reasons set forth herein, the government's motions are **DENIED**. This Court will remain presiding over this case, and its investigation into possible violations of Fed.R.Crim.P. 6(d) and (e) shall proceed as detailed in Section V(H) of this opinion.

I. BACKGROUND

On June 1, 2004, defendant Vazquez-Botet filed an ex-parte sealed motion alleging irregularities in the grand jury process and requesting an investigation. (Docket No. 35). Vazquez-Botet appended an anonymous letter from a person purporting to be a grand jury member and claiming troubling irregularities in the grand jury proceedings. Following that motion, the Court authorized limited disclosures of ministerial grand jury records. On November 9, 2004, the Court referred the matter to Chief Magistrate Judge Justo Arenas to conduct interviews with the grand jurors regarding the alleged irregularities (Docket No. 109), the results of which were made available to the parties during the March 14, 2005 Status Conference (Docket No. 159). Defendants coextensively moved for an expert examination of the grand jury room to determine whether grand jury secrecy could have been pierced by government agents in a position to overhear the grand jurors' conversations. (Docket No. 133). On February 3 and March 21, 2005, the Court issued Orders initiating such an expert investigation, and on June 29, 2005, acoustical expert Dr. Jorge Rocafort submitted his sealed report. Again, the Court made Dr. Rocafort's report available to the parties via Sealed Order. (Docket No. 184). Upon disclosure of Chief Magistrate Judge Arenas' Report, defendants moved for further investigation of grand jury proceedings (Docket Nos. 164 and 167), which the government opposed for the first time. (Docket No. 178).[1] On August 2, 2005, defendant Vazquez-Botet filed a sealed motion submitting a sworn statement from former Assistant United States Attorney Joseph Frattallone-Marti with which he sought to buttress the defense's request for continued investigation into the possible rupture of grand jury secrecy. (Docket No. 182). Defense counsel notified and sent a copy of this motion to the government. On August 30, 2005, the Court issued an unsealed Order continuing the trial *sine die* pending conclusion of its investigation, and excluding the duration of the investigation from the provisions of the Speedy Trial Act.[2] (Docket

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[1] This opposition to the defendants' motion is the first and only sign of displeasure from the government on the record, and the last one prior to the recusal motion now before the Court.

[2] Contrary to the governments contentions, though referring to "troubling
(continued...)

No. 195). On October 3, 2005, the government moved, through sealed and unsealed versions of its motions, for the Court's recusal, and for stay and termination of the investigation (Docket Nos. 197, 198 and 200).[3] Defendants jointly opposed the government's request (Docket No. 206), and the government replied. (Docket No. 211).

II. THE GOVERNMENT'S RECUSAL MOTION

Though by no means controlling, it is illustrative that the government's motion is practically devoid of legal citations. That this is so, however, is not surprising, as this Circuit (or any other) has never required recusal of a judge based on nothing more than innuendo and

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(...continued)
allegations regarding the above styled and captioned case", the Court made no mention of the nature or scope of its investigation in its August 30, 2005 Order to avoid any potential prejudice to either party. Nor did the Court accuse either party of being the culprit of the allegations that prompted the Court's investigation.

[3] The Court will not speculate as to the government's motives for filing an unsealed version of its motion. However, given the motion's inextricable relation to the Court's investigation of potential grand jury violations, by filing an unsealed version the government violated Local Rule 106(b). Rule 106(b) provides that "[a]ll subpoenas, **motions, pleadings**, and other documents...concerning or contesting grand jury proceedings **shall be sealed unless otherwise ordered by the Court**." L.Crim.R. 106(b) (emphasis provided). The Court reminded the parties of their required compliance with Local Rule 106(b) in its August 2, 2005 Order (Docket No. 184), a fact that underscores the government's infringement.

conjecture.[4] Stripped of its rhetorical gloss, In re United States, 158 F.3d at 31, the government's recusal motion rests on the following feeble grounds:

1. That the Court engaged in a secret investigation into potential government misconduct without legal or factual bases to do so;
2. That some of the Court's rulings in the case of U.S. v. Rivera-Rangel, Cr. No. 02-98 (PG), and their subsequent reversal by the First Circuit establish the appearance of partiality and warrant recusal; and
3. That the Court has impermissibly injected its alleged political affiliation into the proceedings, and that this political affiliation has motivated its investigation.

Following, the Court discusses the applicable standard, the timeliness of the government's motion, and lastly, considers each of the government's grounds in turn.[5]

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[4] The Government, through its word choice, misleading citations, and other instances of questionable ethical judgment, has also attempted to incite the Court's ire so as to cement an otherwise baseless motion for recusal. However, the Court will not dwell on the Department of Justice high echelon's decision to sign a motion riddled with pejorative and highly charged language. Their word choice speaks volumes for itself. Nonetheless, given its ethical implications, the Court is more troubled by the Public Integrity Section's endorsement of a motion that contains numerous misrepresentations of fact and law, and more alarming, was filed in unsealed form in clear violation of Local Rule 106(b).

[5] Because several issues and arguments raised by the government

(continued...)

III. RECUSAL STANDARD

It is well settled that section 455(a) motions customarily are decided by the judge whom the movant seeks to disqualify, a fact neither party challenges. See In re Martinez-Catala, 129 F.3d 213, 220 (1st Cir. 1997) (holding that to the extent facts relevant to the recusal determination are in dispute, "factual determinations are made by the judge whose recusal is in question, and the same judge also decides whether the facts trigger disqualification."). It is significant to note from the outset the narrowness of the government's position: it does not contend that this Court has any actual bias or prejudice which would require recusal under 28 U.S.C. § 144 (1994). It likewise eschews the mandatory bases for disqualification listed in 28 U.S.C. § 455(b) (1994).[6] Instead, the government premises its recusal motion exclusively on 28 U.S.C. § 455(a) (1994), which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The Court begins, as it must, with the statute. Section 455(a)

(...continued)
bleed into more than one section, the Court will discuss them wherever they are relevant, even at the expense of some redundancy.

[6] As defendants correctly point out, the government has made several vague references to actual bias (See Gov't Mot. at 2, Docket No. 200). However, throughout its motion, the government abandons this line both through its arguments and through its obvious non-compliance with the procedural requirements of 28 U.S.C. §§ 144 and 455(b). Consequently, the Court will consider the government's motion strictly as one under § 455(a).

"stands at a crossroads between competing policy considerations." In re United States, 158 F.3d 26, 30 (1st Cir. 1998). On the one hand, the statute forbids "not only the reality of partiality, but its objective appearance as well." Liteky v. United States, 510 U.S. 540, 548 (1994). On the other hand, recusal on demand "would put too large a club in the hands of litigants and lawyers", granting them a veto power over unwanted judges. In re United States, 158 F.3d at 30. Consequently, it has become axiomatic that judges are not to recuse themselves lightly under section 455(a). See H.R. Rep. No. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 ("[Section 455(a)] should not be used by judges to avoid sitting on difficult or controversial cases."). Though doubts ordinarily ought to be resolved in favor of recusal, In re United States, 158 F.3d at 30, a Supreme Court Justice has noted that "a high threshold is required to satisfy th[e recusal] standard." Liteky, 510 U.S. at 557-558 (Kennedy, J., concurring in the judgment). See In re United States, 158 F.3d at 34 (citing Justice Kennedy's *Liteky* concurrence for the high threshold proposition). See also Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 491 (1st Cir. 1989) (noting that the judicial system would be "paralyzed" were recusal standards too low). Thus, under § 455(a) a judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise, he has a duty to sit.[7] A more lenient approach "would transform recusal motions into tactical weapons which prosecutors and private lawyers alike could trigger by manipulating the gossamer strands of speculation and surmise." In re United States, 158 F.3d at 35.

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[7] While section 455(a) modified the duty to sit doctrine to require that judges resolve close cases in favor of recusal, it did not eliminate it. See In re Martinez-Catala, 129 F.3d at 221. Thus, in the sense "that judges hear cases unless there is some reason not to, the 'duty to sit' remains." United States v. Snyder, 235 F.3d 42, 46 n. 1 (1st Cir. 2000) (citing Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979)).

For these reasons, section 455(a) requires a judge to step down "only if the charge against her is supported by a factual foundation and the facts provide what an objective, knowledgeable member of the public would find to be a *reasonable basis* for doubting the judge's impartiality." Id. at 30 (internal citations omitted) (emphasis in original). See also Comfort v. Lynn School Committee, 418 F.3d 1, 26 (1st Cir. 2005) (stating and applying same recusal standard). In our Circuit, a knowledgeable person under section 455(a) is one "fully informed of all the facts." In re United States, 158 F.3d at 31. See also Cheney v. U.S. District Court for the District of Columbia, 124 S.Ct. 1391, 1400 (2004) (Scalia, J., sitting as single Justice) ("It is well established that the recusal inquiry must be made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances*") (emphasis in original) (internal citations omitted). Furthermore, a judge "is not compelled automatically to accept as true the allegations made by the party seeking recusal." In re Martinez-Catala, 129 F.3d at 220. Instead, the factual foundation must be anchored on "facts proven", not on "unverified suspicions harbored by the government or the innuendo interspersed throughout...its recusal motion." In re United States, 158 F.3d at 31.

Additionally, the factual basis for a recusal motion generally must stem from an extra-judicial source. Liteky, 510 U.S. at 555. After Liteky, it is axiomatic that the extrajudicial source limitation "should govern for purposes of § 455(a)." Id. at 553. Though described as a doctrine "more standard in its formulation than clear in its application," Id. at 544, the extrinsic source limitation is "the only *common* basis" for establishing disqualifying bias or prejudice. Id. at 551. This limitation to section 455(a) requires that the alleged bias or prejudice "must derive from something other than that which the judge learned by participating in the case." Jaffe v. Grant, 793 F.2d 1182, 1189 (11th Cir. 1986). Even though the Supreme Court has noted that the extrajudicial source limitation is not the exclusive reason a predisposition can be wrongful or inappropriate, the only exception to it that has emerged from the recusal jurisprudence is the so-called "pervasive bias" exception. Liteky, 510 U.S. at 551. Thus, Justice Kennedy has noted that "under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute", a formulation the First Circuit has adopted as its own. See In re United States, 158 F.3d at 34. See also Guide to Judicial Policies and Procedures, Vol. 2 Advisory Op. No. 66, IC-149 (1999) (stating that § 455(a) is not implicated unless the conduct reflects "deep seated favoritism or antagonism that would make fair judgment impossible); United States v. Berger, 375 F.3d 1223, 1227 (11th Cir. 2004) (holding that absent a showing of "pervasive bias and prejudice," a § 455(a) motion must "stem from extrajudicial sources.") (internal citations omitted).

IV. TIMELINESS OF THE GOVERNMENT'S MOTION

The government filed its recusal motion on October 3, 2005. As is intimated above and described in more detail in the sections that follow, the government's motion relies primarily on the following: (a) the Court's investigation into potential grand jury secrecy violations; and (b) the alleged appearance of partiality created by the Court's reversed rulings in the unrelated matter of *United States v. Ramirez-Rangel,* and the Court's political affiliation as purportedly expressed during meetings with FBI Special-Agent-in-Charge Luis Fraticelli.

When confronted with a recusal motion pursuant to § 455(a), a "court's inquiry into the timeliness of the government's motion" is a "proper subject for scrutiny." In re United States, 158 F.3d at 34. In fact, contrary to the government's suggestions that partiality allegations under § 455(a) are not subject to dismissal for untimeliness (Gov't Reply at 7, Docket No. 211), it is well settled that "while section 455(a) contains no express timeliness provision, most circuits considering the matter have concluded that a litigant must raise the disqualification issue within a reasonable time after the grounds for it are known." United States v. Barrett, 111 F.3d 947, 951 (D.C. Cir. 1997). See also El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 n. 6 (1st Cir. 1994) (noting that the section 455(a) recusal motion before them "may have been rendered infirm by the delay in filing."); United States v. Slay, 714 F.2d 1093, 1094 (11th Cir. 1983) (holding that timeliness is a component of section 455(a)). Thus, a party must bring a recusal motion under section 455(a) at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification. United States v. Kelly, 519 F.Supp. 1029, 1047-1050 (D. Mass. 1981). See also Apple v. Jewish Hosp., 829 F.2d 326, 333 (2d Cir. 1987) (holding that a party must bring a recusal motion "at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for such a claim."); Slay, 714 F.2d at 1094 (holding that defendant's recusal motion was untimely because counsel was aware of the facts which allegedly supported his motion to disqualify before the hearing). Exempting section 455(a) from a timeliness requirement "would encourage parties to withhold recusal motions pending a resolution", thereby allowing parties to sandbag the Court if dissatisfied with its rulings. Fenix de Puerto Rico, 36 F.3d at 141 n. 6 (citing E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1295 (9th Cir. 1992)).

The instant case has been active before this Court since April 8, 2004. As detailed in section I, *supra*, the Court has been investigating serious and troubling allegations of potential grand jury secrecy violations since early June, 2004. Throughout this investigation, the Court regularly appraised both the defense and the government of its progress, and consistently disclosed relevant documents to both parties as they became available. This flow of information notwithstanding, the government first saw fit to oppose the continuation of the investigation on July 20, 2005, at which point it did not seek the Court's recusal. (Docket No. 178). In this context, even assuming *arguendo* that the government's complaints about the Court's investigation are proper grounds for recusal, its argument that recusal is warranted because the Court lacked a legal basis to conduct its investigation (Gov't Mot. at 1, Docket No. 200) is untimely. If in fact the government believes the Court should step aside because it has conducted an investigation without authority or legal basis to do so, it should have moved for recusal as soon as the Court initiated such an investigation, or at least in its opposition to the defense motion for continued investigation.

Also, the government's argument that the Court's meetings with and alleged statements to SAC Fraticelli require recusal is likewise untimely. The government did not seek an affidavit from SAC Fraticelli until September 29, 2005. However, the two meetings Fraticelli recounts in his affidavit occurred during June 2004.

Furthermore, the government acknowledges that the Court notified the parties during a June 2004 *in camera* status conference that it "believed the FBI and the PR-USAO were responsible" for the leaks. (Gov't Mot. at 5, Docket No. 200). Notwithstanding, the government did not seek the Court's recusal between June 2004 and October 2005, a 16 month period during which it filed numerous motions with the Court. Since the government was well aware of the Court's concerns, of its suspicion pointing to the FBI and PR-USAO, and of the meetings with SAC Fraticelli, but chose not to move for recusal until 16 months later, the Court cannot but conclude that, displeased with the Court's rulings, the government has chosen to wield its recusal motion as a tactical weapon against this court in hopes of being heard by a different judicial officer more to its liking.[8]

Finally, the government's reliance on this Court's rulings in the *Rivera-Rangel* case and the First Circuit's reversal of those rulings is equally and fatally dilatory. The Court's relevant opinion and orders in the *Rivera-Rangel* case were entered on September 9, 2003 and May 19, 2004. (Cr. No. 02-98, Docket Nos. 131 and 149). The First Circuit reversed these opinion and orders via published opinion on February 8, 2005, and on March 23, 2005 denied rehearing *en banc*. United States v. Ramirez-Rangel, 396 F.3d 476 (1st Cir. 2005). Though, as mentioned above, the present case has been active before this Court since April 8, 2004, the government did not seek recusal within a reasonable period following the First Circuit's decision in *Rivera-Rangel.* Instead, it again waited for a more convenient and strategically opportune moment to move for the Court's disqualification, a practice clearly and resoundingly rejected by the overwhelming weight of precedent.

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[8] It is relevant to note that, as early as April 15, 2004, the defense ominously warned that the government was attempting to "take this case away from Judge Perez-Gimenez without directly moving for his recusal" by misleadingly moving Chief Judge Jose A. Fuste to transfer the case to his docket and consolidate it with one of his cases. (Docket No. 19 at 2). This failed attempt violated Local Rule 3.2, which places the initial transfer decision on the judge to whom the case was originally assigned, and, when granted, requires the consent of the receiving judge to complete the transfer and consolidation. However, in the instant case the government requested the receiving judge (Chief Judge Fuste) to order the transfer instead of first asking the judge to whom the case was originally assigned (this Court) to do so.

Undaunted by the weight of adverse case law and facts, the government argues for the application of a "tipping point" timeliness standard, a test heretofore unrecognized by the First Circuit, or any other Circuit to have addressed the matter.[9] (Gov't Reply at 7, Docket No. 211). The Court finds no reason to deviate from the well-settled precedent that grounds for recusal must be raised as soon as the party seeking disqualification becomes aware of them. Instead of requesting recusal as soon as it became aware of the facts that allegedly require it, the government chose to sit on these facts in the hopes of having ammunition against the Court if and when the government was unhappy with its rulings. Consequently, the Government's motion for recusal should be denied as untimely. However, in the interest of thoroughness, the Court will next address each of the government's arguments for recusal, a road that, though longer, in the end leads to the same conclusion: that the government's motions for recusal and stay must be denied.

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[9] In fact, the government does not cite any authority for the so-called "tipping point" standard, and the Court's research has not uncovered any, either.

V. THE COURT'S INVESTIGATION

The government's main argument in favor of recusal is cemented on the proposition that "the Court is no longer acting as an impartial judicial officer, but instead has taken on the role of an inquisitor/prosecutor by conducting an on-going and secret investigation of the government." (Gov't Mot. at 1, Docket No. 200). As is obvious from the government's own formulation of their argument, it seeks recusal based on its dissatisfaction with how the Court has shepherded this case in general, and the investigation into potential grand jury secrecy violations in particular. However, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion...Almost invariably they are proper grounds for appeal, not for recusal." Liteky, 51 U.S. at 555. This "may be true even when the judicial rulings in question are erroneous." In re Boston's Children First, 244 F.3d 164, 167, n. 7 (1st Cir. 2001). Thus, like most of the grounds and arguments advanced by the government, its complaints about the ongoing investigation into potential grand jury secrecy violations are nothing more than signs of displeasure with the Court's judicial rulings. However, instead of appealing, the government now seeks a judge more to its liking. Nonetheless, the Court now turns to the merits of the government's recusal motion so as not to leave any stone unturned.

A. The Institution of the Grand Jury

The grand jury is deeply rooted in long centuries of Anglo-American legal history. Though not mentioned in the body of the

Constitution, the Founding Fathers "thought [it] so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a presentment or indictment of a grand jury." United States v. Calandra, 414 U.S. 338, 343 (1974). That it "has not been textually assigned to any of the branches described in the first three Articles", U.S. v. Williams, 504 U.S. 36, 47 (1992), underscores the fact that the grand jury is a "constitutional fixture in its own right." Williams, 504 U.S. at 47 (quoting U.S. v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977)). In fact, the historic theory behind the grand jury's function is that "it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." 504 U.S. at 47. These historic functions survive to this day, as its responsibilities "continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." Calandra, 414 U.S. at 343. This dual role as investigator and protector has garnered descriptions of the grand jury as both a sword and a shield.

B. The Court's General Supervisory Power Over Grand Jury Proceedings

Recognizing the tradition of independence underlying the grand jury, the Supreme Court has said that the "Fifth Amendment's constitutional guarantee presupposes an investigative body acting independently of either prosecuting attorney or judge." United States v. Dionisio, 410 U.S. 1, 16 (1973) (quoting Stirone v. United States, 361 U.S. 212, 218 (1960)). However, the grand jury "is not an autonomous body completely beyond the reach of other branches." Williams, 504 U.S. at 66 (Stevens, J., dissenting). The Supreme Court has held that though "a grand jury is clothed with great independence in many areas...it remains an appendage of the court." Brown v. United States, 359 U.S. 41, 49 (1959).

In this context, it is the courts' duty to ensure that grand juries perform their functions aptly and justly, so that they might serve "the invaluable function in our society of standing between the accuser and the accused...to determine whether a charge is founded upon reason or was dictated by an intimidating power or malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962). To these ends, courts "retain general supervisory power over the grand jury to prevent abuse of its process or the invasion of the constitutionally protected rights of the witnesses called before it." In re Maury Santiago, 533 F.2d 727, 731 (1st Cir. 1976). These supervisory powers, though more limited than those over the petit jury, are nonetheless essential tools courts can and must wield to ensure the legality, fairness, and impartiality of grand jury proceedings. See U.S. v. Vetere, 663 F.Supp. 381, 386 (S.D.N.Y. 1987) (holding that "the exercise of the court's supervisory power can extend beyond the minimum requirements set by the Constitution to encourage fair and uniform procedures in the prosecution of criminal cases.").

Significantly, federal courts may exercise their supervisory powers over grand juries to remedy violations of recognized rights, to protect the integrity of the federal courts, and to deter illegal conduct by government officials. United States v. DiBernardo, 775 F.2d 1470 (11th Cir. 1985), *cert. denied* 476 U.S. 1105 (1985). For example, courts have often resorted to their inherent supervisory power to deal with and remedy prosecutorial misconduct before the grand jury. The Fourth Circuit has held that a district court's supervisory power over grand jury proceedings is sufficient for it, upon proper proof, to impose civil or criminal contempt sanctions for violation of grand jury secrecy rules "because its inherent powers are not proscribed by Rule 6." Finn v. Schiller, 72 F.3d 1182, 1191 (4th Cir. 1996). The remedies fashioned by courts pursuant to their inherent supervisory power over grand jury proceedings range from recommending disciplinary action against a prosecutor found to have engaged in misconduct before the grand jury in violation of the law or Department of Justice policies and guidelines, to imposition of civil or criminal contempt sanctions, to more severe remedies like suppression of grand jury testimony, and, in last resort and upon a showing of prejudice, dismissal of the indictment. See U.S. v. Pacheco Ortiz, 889 F.2d 301, 309 (imposing the severe sanction of suppressing grand jury testimony "for the failure to follow Justice Department policy"); Schiller, 72 F.3d at 1190 (holding that a district court's supervisory power over grand jury proceedings is sufficient for it, upon proper proof, to impose civil or criminal contempt sanctions for violation of grand jury secrecy rules); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) (holding that a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudice the defendants).

C. The Court's Power to Investigate and Remedy Violations of Rules 6(d) and 6(e) of the Federal Rules of Criminal Procedure

Among the grand jury's most significant attributes, both historical and practical, is the secrecy of its processes and deliberations. Indeed, the Supreme Court has consistently "recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979); United States v. Proctor & Gamble Co., 356 U.S.

677 (1958). Preserving the confidentiality of the grand jury protects several important interests of the government and of private citizens. First, if pre-indictment proceedings were public, individuals who learned of their possible indictment might flee the jurisdiction or attempt to tamper with the grand jurors or witnesses appearing before them. Persons with information about crimes would be less willing to appear voluntarily and to speak fully and frankly, knowing that the individuals about whom they testify would be aware of that testimony. The rule of secrecy avoids injury to the reputation of those persons accused of crimes whom the grand jury does not indict. Finally, it encourages the grand jurors to investigate suspected crimes without inhibition and to engage in unrestricted deliberations. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 219; United States v. Proctor and Gamble Co., 356 U.S. at 681 n.6; United States v. Malatesta, 583 F.2d 748, 752 (5th Cir. 1978), *modified on other grounds*, 590 F.2d 1379 (*en banc*), *cert. denied*, 440 U.S. 962 (1979). Beyond jurisprudential recognition and enforcement, the Federal Rules of Criminal Procedure embody these policies and expressly protect grand jury secrecy, specifically through Rules 6(d) and 6(e). Additionally, this Court has supplemented the protections of Rule 6(d) through its Local Criminal Rule 106(c).

Under the caption of "Who May be Present," Federal Rule of Criminal Procedure 6(d)(2) states that "[n]o person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting." The Rule "protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty." United States v. Mechanik, 475 U.S. 66, 70. Additionally, the Rule "is designed to guard the secrecy of the grand jury proceedings, prevent intimidation of jurors, and guarantee that the grand jury is given an opportunity to make an independent examination of the evidence..." Mechanik, 475 U.S. at 74 (O'Connor, J., concurring in the judgment). As a supplement to Rule 6(d), this District has enacted Local Rule 106(c), which reads as follows:

> When the grand jury is in session, the area surrounding the grand jury room shall be secured, and **no one** shall be permitted to wander about, sit in the corridors, or otherwise attempt to ascertain the identity of witnesses or members of the grand jury. (emphasis added).

With the same secrecy policies as guiding beacons, Rule 6(e) permits matters occurring before a grand jury to be disclosed to an attorney for the government and any government personnel necessary to assist him or her to enforce federal criminal law. See Fed. R. Crim. P. 6(e)(2) and 6(e)(3)(A)(ii). Rule 6(e)(2) prohibits those individuals from disclosing "matters occurring before the grand jury" except as otherwise authorized by the Rule. See id. Courts have construed the phrase "matters occurring before the grand jury" to include any item that might reveal what occurred before the grand jury. See In re: Grand Jury Investigation (Lance), 610 F.2d 202, 216-17 (5th Cir. 1980). There is general agreement that Rule 6(e) does not protect only the transcript or the minutes of the grand jury proceedings, but also any information that would reveal the identities of the grand jurors or witnesses, the substance of testimony, the strategy or direction of the investigation, the grand jurors' deliberations or questions, or any comparable matter. Id. Thus, Rule 6(e) applies "not only to events which have already occurred before the grand jury, such as witness's testimony, but also to disclosures of matters which will occur..." Id. at 217.

As has been mentioned before, it is among "the important responsibilities of a district judge to safeguard against unreasonableness and oppression" in the government's use of the grand jury. In re Grand Jury Matters, 751 F.2d 13, 19 (1st Cir. 1984). Indeed, presented with a *prima facie* showing of potential grand jury secrecy violations, "the court *must* take appropriate steps to determine whether a violation has occurred." Finn v. Schiller, 72 F.3d 1182, 1189 (4th Cir. 1996)(finding that the court has a **duty** to protect the integrity of grand jury proceedings, and remanding the case to the district court with instructions that it investigate the grand jury secrecy violations) (emphasis added). See generally In re Grand Jury Porceedings, 814 F.2d 61, 71 (1st Cir. 1987) (noting that despite the "presumption of regularity" that clothes grand jury proceedings, neither the First Circuit nor other courts "have shirked the responsibility of deciding the merits of challenges to grand jury proceedings). Thus, in exercising their duty, "courts must not tolerate violations of Rule 6(e) [or Rule 6(d)] by anyone, especially United States Attorneys..." Finn, 72 F.3d at 1189.

Furthermore, the Court is empowered to impose contempt sanctions for past violations, see Fed.R.Crim.P. 6(e)(7), and to afford equitable relief to guarantee the secrecy and proper functioning of the grand jury in the future. See Barry v. United States, 865 F.2d 1317, 1321-22. In extreme cases where defendants can establish prejudice, even dismissal of the indictment may be appropriate. See Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1998) (O'Connor, J., concurring). Even though in Mechanik v. United States, 475 U.S. 66 (1986), the Supreme Court held that a petit jury verdict would render harmless any Rule 6(d) violation brought to the Court's attention after trial, the Court expressly left open the question of "what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial." Mechanik, 475 U.S. at 72. Indeed, precisely because a petit jury's guilty verdict renders any grand jury violation harmless, dismissal of the indictment is the most appropriate remedy for gross violations of Rule 6, and has remained the presumptive remedy for violations of Rule 6(d). United States v. Echols, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied* 431 U.S. 904 (1977). See, e.g., United States v. Carper, 116 F.Supp. 817 (D.D.C. 1953) (dismissing indictment when three government agents admitted being present in the grand jury room while witnesses were testifying, even though they were not present when the jurors were deliberating or voting).

That the duty to investigate potential violations of Rules 6(d) and 6(e) is shouldered by the district court makes sense both in practical and policy terms. To place the duty on the government would be to tempt fate, leaving the fox to guard the chickens. See generally In re Pantojas 628 F.2d 701, 704-05 (1st Cir. 1980) (noting that "the practical responsibility for controlling grand jury excesses lies with the district court."). Furthermore, the Court's power and authority to investigate potential government breaches of grand jury secrecy is consistent with the Supreme Court's direction that:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement

> officers coming under the jurisdiction of the court should be permitted to frustrate this function.

Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). For similar reasons, courts are endowed with considerable discretion in conducting investigations into possible grand jury secrecy violations. In re Sealed Case, 151 F.3d 1059, 1073 (D.C. Cir. 1998) (holding that "the district court should have sufficient leeway to establish procedures it believes will assist it best in discovering the truth of the matter while at the same time not causing undue interference with either the work of the grand jury or that of the district court itself.")

The Court's power to investigate and remedy violations of Rules 6(d) and 6(e) being clear, we now turn to the investigation and evidence presented in the instant case. As a threshold matter, the Court notes that the *prima facie* showing which sparks a court's duty to investigate potential grand jury secrecy violations amounts to "little more than a showing of whatever is required to permit some inferential leap sufficient to reach a particular outcome." In re Grand Jury Proceedings, 417 F.3d 18, 22-23 (1st Cir. 2005) (also cataloguing *prima facie* "among the most rubbery of all legal phrases..."). In the specific context of Rule 6(e), the movant's burden is "relatively light" and the showing "need only be susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government..." Barry v. United States, 65 F.2d 1317, 1325 (D.C. Cir. 1989). The Court agrees with defendants and holds that they have come forth with sufficient evidence to constitute a *prima facie* showing of violations of both Rule 6(d) and 6(e), thereby triggering the Court's duty to investigate and demolishing the government's contention that the Court's investigation constitutes a cognizable ground for recusal under 28 U.S.C. § 455(a).

D. Prima Facie Evidence of Rule 6(d) and Local Rule 106(c) Violations

Federal Grand Jury No. 03-1 returned the indictment in the captioned case on April 8, 2004. However, another Grand Jury, No. 02-1, had been previously empaneled to receive evidence pertaining to the same case. On June 1, 2004, Defendant Vazquez-Botet filed a sealed *ex parte* motion, (Docket No. 35), to which he appended a letter addressed to defense counsel from an individual who identified himself as a former member of Grand Jury 02-1. In the letter, the purported former grand juror alleged that prosecutor Mary K. Butler had taken "the case away from us [Grand Jury 02-1] on February 24, 2004 upon learning that the vast majority of the grand jury had decided on a NO TRUE BILL." (Docket No. 35, Ex. 1). The author of the letter proposed that "[their] theory and what [they] suspect about this are [sic] that the area where the Grand Jury members have coffee they had a microphone and listened in on our conversations..." (Docket No. 35, Ex. 1).

After the Court's Order to disclose some of Grand Jury 02-1's ministerial records to the defense, (Docket No. 109), defendants also learned that Grand Jury 02-1 had been empaneled on February 26, 2002, and received an extension on August 25, 2003. It expired without voting on February 24, 2004. During Grand Jury 02-1's 2-year life span, it met on the instant case twenty (20) times and heard a total of 73 hours worth of evidence. Despite the government's significant time investment in Grand Jury 02-1, and the fact that it had close to a month of its term left, the government stopped presenting evidence to

Grand Jury 02-1 on January 30, 2004, and began presenting evidence to Grand Jury 03-1. In contrast to Grand Jury 02-1, 03-1 met only on 5 occasions during a five week period (four times in March, 2004 and a final time on April 8, 2004 when it returned the indictment) and heard evidence on this case for a total combined amount of 23 hours.[10]

Based on the former grand juror's allegations, defendants moved the Court to investigate, and the Court Ordered such an investigation on November 9, 2004. (Docket No. 109). The Court referred the matter to Chief Magistrate Judge Justo Arenas, and directed him to interview members of Grand Jury 02-1 *ex parte* and *in camera.* (Docket No. 109). Relying on the grand juror's letter in conjunction with the circumstantial evidence about the government's grand jury switch, defendants later argued that a *prima facie* showing had been made to support the conclusion that the government had been surreptitiously listening to Grand Jury 02-1's deliberations in contravention of Rule 6(d) and Local Rule 106(c), which in turn warranted further investigation. (Docket No. 131). Specifically, defendants claimed that the government had used Grand Jury 02-1 "as a 'focus group'" before which prosecutors could surreptitiously gauge reactions to their presentation and later present only the well-received evidence to the indicting Grand Jury, 03-1. (Docket No. 131 at 2).

Meanwhile, Magistrate Judge Arenas interviewed the grand jurors during December 7, 28 and 30, 2004, reaching the ultimate conclusion that their testimony was "alone inconclusive" concerning "possible irregularities" in Grand Jury 02-1's proceedings. The Magistrate's report was made available to the parties on March 14, 2005. As a preliminary matter, the Court notes that, though a helpful initial step, Magistrate Judge Arenas' questions were general, concentrating on whether the grand jurors were aware of any "irregularities" in the proceedings, whether government personnel were "imped[ing]" their functions, or whether they were aware of any behavior that made them doubt the "integrity" of the proceedings. However, Magistrate Judge Arenas did not explore the possibility of government eavesdropping. Nonetheless, despite the general nature of the Magistrate's inquiry, the transcript of the exchanges between Magistrate and grand jurors contains several statements from the latter that highlight the need to continue the investigation. For example, several grand jurors including Grand Juror 1, Grand Juror 2 and Grand Juror 3 expressed their amazement and frustration at having the case taken from them so close to the time when they believed they were going to vote. Similarly, grand jurors 4 and 5 expressed surprise at Grand Jury 03-1's quick indictment, especially when Grand Jury 02-1's time considering evidence was almost four times longer than 03-1's. Finally, and more importantly, at least three grand jurors commented on the lack of privacy in the grand jury area, especially in the kitchenette where grand jurors take coffee. Though the government admittedly warned the grand jurors about the importance of keeping their voices down in the grand jury area, the grand jurors' comments cannot easily be ignored in the context of potential Rule 6(d) violations and of the facts recounted below.

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[10] Interestingly, the defense points out that during the same 5 week period that it heard evidence about this case, Grand Jury 03-1 returned indictments in at least 7 other cases, thereby casting further doubts on the quality and quantity of attention it could have paid the instant case. See Defs.' Resp. at 24 n.15, Docket No. 206.

Resting on the "inconclusive" nature of the Magistrate's findings and on some of the grand jurors' answers, defendants again moved to Court for further investigation, including scientific testing of the grand jury area. (Docket Nos. 133, 164 and 167). Agreeing that such an important matter should not remain "inconclusive", and that a sufficient *prima facie* basis had been laid, the Court ordered an expert examination of the grand jury area examination through Orders dated February 3 and March 21, 2005. An acoustical study of the grand jury area was later conducted by acoustical engineer and professor Dr. Jorge Rocafort.

On July 16, 2005, while Dr. Rocafort conducted his examination, defendants submitted to the Court and the government an affidavit from former Criminal Division Assistant United States Attorney Joseph Frattallone-Marti, Esq. (Docket No. 182). Mr. Frattallone recounted an event from April 20, 2005, in which he witnessed FBI Special Agents Ivan J. Vitousek and Jose Luis Hernandez exiting a room adjacent to the Grand Jury witness room, where they had been for over a half-hour. (Aff. of Joseph Frattallone ¶ 5, Docket No. 182, Ex. 1). Mr. Frattallone confirmed that the door leading into the room from which the agents exited "had a sign posted forbidding entrance to all but grand jurors or words to that effect." (Aff. of Joseph Frattallone ¶ 5, Docket No. 182, Ex. 1). The government has not submitted any affidavit or other evidence rebutting Mr. Frattallone's version of events, even though they were notified nearly three months prior to filing their recusal motion. Instead, the government seems to acknowledge and adopt as true Mr. Frattallone's observations when it states that "[a]gents frequently are present outside during grand jury sessions to testify before grand juries...They are of course not permitted to observe witness testimony in the hearing room but the testimony is not kept from them." (Gov't Mot. at 16 n.10, Docket No. 200). Regardless of what "frequently" happens, it is clear that even the government's hypothetical scenario is in direct violation of Local Rule 106(c)'s unequivocal admonition that "**no one** shall be permitted to wander about [or] sit in the corridors" of the grand jury area while the grand jury is in session. L.Cr.R. 16(c) (emphasis added). Even so, the government has never addressed directly the very specific version of events offered by Mr. Frattallone, which places FBI Agents Vitousek and Hernandez inside a room adjacent to the grand jury room and restricted to grand jurors. Thus, Mr. Frattallone's account of events remains unchallenged and unimpeached.

Mr. Frattallone's affidavit is further substantiated by a separate yet eerily similar occurrence recounted by former Special Assistant United States Attorney for the District of Puerto Rico Gary Montilla-Brogan, Esq. (Aff. of Gary Montilla, Docket No. 219). Mr. Montilla, an experienced attorney well acquainted with the grand jury area in this District, alleges that, on August 2005, while waiting for his client in the designated waiting room, he witnessed Trial Attorney Mary Butler and Special Agent Ivan Vitousek "exit[ing] from the break room into the waiting room at the same time or shortly after [his] client." (Aff. of Gary Montilla ¶ 4, Docket No. 219). Agent Vitousek's and Trial Attorney Butler's presence in a room restricted to grand jurors from which, as explained below, they could have overheard the grand jurors' conversations and deliberations "surprised and sufficiently concerned" Mr. Montilla, a concern the Court shares especially in light of the fact that such actions do not seem to be circumscribed to the case at bar. (Aff. of Gary Montilla ¶ 5, Docket No. 219).

Dr. Rocafort subsequently completed his expert acoustical examination of the grand jury space, and the Court made the study available to the parties on August 2, 2005. (Docket No. 184). After a detailed and technical acoustical examination of the grand jury room, waiting room and kitchen, Dr. Rocafort found that "significant sound transmission occurs between the rooms," and that "[t]he intelligibility of single words was relatively high." (Dr. Rocafort's Report at 6). Importantly, Dr. Rocafort concluded that "[c]onfidential privacy is not maintained" in the grand jury rooms, (Id.), a conclusion confirmed by the testimony of several Grand Jury 02-1 grand jurors, by government attorneys, and by the experiences of Mr. Montilla as recounted in his affidavit.[11] Though weighty on their own, Dr. Rocafort's expert findings acquire even greater significance in light of Mr. Frattallone-Marti's and Mr. Montilla-Brogan's unchallenged affidavits, which place government personnel in areas restricted to grand jurors in two separate occasions, and from which they could have overheard the grand jurors' conversations and deliberations. These facts, taken together, greatly magnify the specter of potential government eavesdropping in violation of Rule 6(d) and Local Rule 106©.

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[11] Mr. Montilla stated that he has "certain and specific recollection from the time that [he] worked as a SAUSA that the voices of persons speaking inside the grand jury hearing room were audible and intelligible to persons inside the break room even when the door separating the break room and the grand jury hearing room was closed." (Aff. of Gary Montilla ¶ 3, Docket No. 219). Furthermore, Mr. Montilla recalled "mentioning to a Department of Justice Attorney with whom [he] was working that unauthorized persons would hear grand jury proceedings if they were in the break room while proceedings were ongoing.

Confronted with these facts, the government employs three arguments. First, it suggests that the Magistrate's interviews with the grand jurors and his subsequent report should have ended the matter, and that, in any event, they vindicated the government's position. (Gov't Mot. at 8, Docket No. 200). As with any other referral of particular matters to a Magistrate Judge, a District Judge is free to adopt or reject the Magistrate's report and recommendation, in whole or in part. See 28 U.S.C. § 636(b); L.Civ.R. 72(d); L.Crim.R. 157.1. Additionally, given Magistrate Arenas' conclusion that the interviews were alone "inconclusive", it is vexing that the government considers the report a "vindication". In light of the seriousness of the allegations involved, the evidence available, and the primacy of the rights at stake, the Court would expect all parties involved to be interested in the most conclusive answer possible, so as to dispel any doubts that might still hover over this case. Consequently, because the Court is not bound by the Magistrate's report and, in any event, its inconclusiveness calls for further inquiry, the government's argument is unavailing.

Second, the government points to its sealed *ex parte* submissions of January 18 and February 1, 2005 explaining why Grand Jury 02-1 was not asked to indict, and suggests that the Court has unreasonably refused to credit its explanations and blanket denials of wrongdoing. In fact, the government posits, albeit indirectly, that the Court's refusal to terminate its investigation in light of the government's affidavits and denials is further evidence of the Court's partiality. As a general matter, courts may accept and even require government affidavits in connection with an investigation into grand jury secrecy violations. See In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987). Once provided, the Court may, but is not obligated to, deem the government submissions sufficient to resolve the matter. In fact, the First Circuit has held that a decision based solely on the government's *ex parte* denials of grand jury abuse

> would have certain problematic implications here. Part of the government's argument in this case focused on the independence of the grand jury from the government's general prosecutorial strategies. Yet, the government asks us to rely on an FBI Agent's unchallenged testimony to prove that the grand jury is acting independently from the Justice Department.

Id. at 72. Where, as in the instant case, the defense comes forth with specific evidence of potential grand jury secrecy violations, the Court acts within its discretion and duty in continuing to investigate despite the government's denials. See In re Grand Jury Investigation (Lance), 610 F.2d 202, 219 (5th Cir. 1980) (even in light of a responsive affidavit provided by the government denying the allegations of grand jury secrecy violations, "the detail as well as the seriousness of a [Rule 6] violation may militate in favor of a further investigation..."). See also Finn v. Schiller, 72 F.3d 1182, 1189 (4th Cir. 1996)(finding that the court has a **duty** to protect the integrity of grand jury proceedings, and remanding the case to the district court with instructions that it investigate the grand jury secrecy violations) (emphasis added).

Finally, the government notes that, even taking the defendants' version of the facts at face value, its decision to seek an indictment from Grand Jury 03-1 instead of 02-1 is unchallengeable under *United States v. Williams*, 504 U.S. 36 (1992). Though the government is correct in its contention that it was free to submit the case to a second grand jury even if the first was not willing to indict, the argument is nonetheless off the mark in the present context. Although the government is unquestionably endowed with wide discretion in its decision whether to submit a case to a particular grand jury, it is unquestionable that prosecutors are bound by the Federal Rules of Criminal Procedure in their actions. Thus, while the government could have decided not to seek an indictment from Grand Jury 02-1 for any reason, or no reason at all, it could not have reached its decision by means of a Rule 6(d) violation. To hold otherwise would create perverse incentives for prosecutors and government agents to violate the same rules meant to cabin their discretion and to protect the rights of grand jury targets and defendants.

Even in light of the government's blanket denials and importunements to the contrary, it is pellucid that the Court has before it an ample and growing *prima facie* basis to investigate the government's possible violation of Rule 6(d) and Local Rule 106(c). Specifically, the Court's duty to investigate is triggered and justified by the following *prima facie* basis:

> (1) An express allegation of a former Grand Jury 02-1 member expressing his concerns that government personnel might have been eavesdropping on the Grand Jury's deliberations and discussions;
> (2) Testimony by several Grand Jurors regarding their surprise at not being able to vote on whether to indict after 20 sessions lasting a total of 73 hours;
> (3) Dr. Rocafort's expert report confirming that there is "no confidential privacy" in the grand jury area, and thus establishing that the government had the opportunity to eavesdrop on the Grand Jury from adjacent rooms; and
> (4) An uncontroverted sworn statement from an officer of this

Court and former Assistant United States Attorney witnessing FBI Special Agents Ivan Vitousek and Jose Hernandez exiting a room adjacent to the grand jury room and strictly reserved for grand jurors.

(5) An affidavit from another attorney and former Special Assistant United States Attorney for the District of Puerto Rico who witnessed FBI Special Agent Ivan Vitousek and Trial Attorney Mary Butler exiting the same restricted area from which they could have overheard the grand jurors' deliberations.

Taken together, these facts would permit a reasonable inference that government personnel had eavesdropped on Grand Jury 02-1's deliberations, and that the information obtained from the eavesdropping prompted the government to take the case from Grand Jury 02-1 and present it anew to Grand Jury 03-1. This amounts to a *prima facie* showing of a Rule 106(d) violation and requires that the Court investigate the matter fully. See In re Grand Jury Proceedings, 417 F.3d 18, 22-23 (1st Cir. 2005) (defining *prima facie* as "little more than a showing of whatever is required to permit some inferential leap sufficient to reach a particular outcome.").[12]

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[12] In an abundance of caution, the Court underscores the narrowness of its holding. While unequivocally ruling that there is and has been a sufficient *prima facie* basis for the Court to exercise its duty to investigate potential grand jury secrecy violations, the Court in no way intimates whether any such violations have in fact occurred. This will only be clear after conclusion of the investigation in accordance with the parameters set forth in Section V(H) of this opinion.

Given this *prima facie* showing, and because none of these facts are extrajudicial in nature, the government's argument that the Court's August 30, 2005 Order (Docket No. 195) continuing its investigation constitutes a basis for recusal must be, and hereby is, rejected.

E. Prima Facie Evidence of Rule 6(e) Violations

The defense has also complained repeatedly to the Court of allegedly prejudicial leaks of grand jury information to the media.[13] As early in the case as April 21, 2004, defendants moved for a protective order regarding allegedly wrongful media leaks by the government. (Docket No. 22). In response, the United States professed to be "troubled by these disclosures" and vowed to "refer the matter for investigation." (Docket No. 23).[14] On July 9, 2004, Vazquez-Botet filed an informative motion alerting the Court to additional media leaks, this time in an article published in The San Juan Star newspaper that same day. (Docket Nos. 51 and 57).[15] The government again responded to defendant's concerns by "categorically den[ying]" responsibility for the leaks, and denounced defense counsel for "[l]evying utterly unsubstantiated allegations" that "smear" the government and "erode civility." (Docket No. 53 at 1-2). However, the government reiterated its "concern about grand jury leaks," and proffered that it was "referring this latest press statement to the investigators to whom the prior allegations were referred." (Docket No. 53 at 2). As with the referral of "prior allegations," there is no evidence on record concerning a government investigation into the matter other than the letters sent by defense counsel to Department of Justice authorities. See discussion at n.12, *supra*. Concerned about the integrity of the judicial system in general and these proceedings in particular, the Court has manifested its concerns both prior to, and during, this case.[16]

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[13] Vazquez-Botet also complained of the leaks to the U.S. Department of Justice Office of Professional Responsibility, which on March 25, 2004 "decided not to initiate an investigation into the alleged unauthorized disclosure." (Defs.' Resp., Docket No. 206, Composite Exhibit I).

[14] The record does not reflect whether the government in fact referred the matter for investigation or conducted an investigation of its own.

[15] Defendants appended the newspaper articles subject of Docket Nos. 22, 51 and 57 to their Response to the government's motion to recuse as Composite Exhibit 1. They later submitted translated versions (Docket No. 221) pursuant to the Court's November 28. 2005 Order (Docket No. 213). For the sake of ready reference, the Court has included the articles in this (continued...)

(...continued)
Opinion and Order as Composite Appendix A.

[16] In fact, allegations of improper media leaks in connection with grand jury proceedings in this District, and this Court's concern with them, are neither novel nor circumscribed to the instant case. On August 7, 2003, in its capacity as Acting Chief Judge, this judge sent a letter to U.S. Attorney for Puerto Rico H.S. Garcia in which it requested an immediate investigation into troubling leaks regarding an unrelated criminal case. Interestingly, referring the matter to then-Special-Agent-in-Charge Patrick Daly, the U.S. Attorney *sua sponte* requested that the investigation be expanded to include "two (2) additional apparent press leaks regarding grand jury and/or an ongoing criminal investigation related to the 'Supertubo' investigation." The "Supertubo" investigation later matured into the case now before the Court. Notably, the press leaks the United States Attorney complained of in his letter occurred prior to the issuance
(continued...)

When a violation of Rule 6(e) is alleged, the Court must first decide whether the moving party has presented a *prima facie* case of such misconduct. See, e.g., In re Sealed Case, No. 98-3077, 151 F.3d 1059, 1067-69 (D.C. Cir. 1998); In re Grand Jury Investigation (Lance), 610 F.2d 202, 214-20 (5th Cir. 1980). In determining whether a party alleging a violation of Rule 6(e) based on news media reports has established a *prima facie* case, a court must consider the following factors.

First, "there must be a clear indication that the media reports disclose information about 'matters occurring before the grand jury.'" Lance, 610 F.2d at 216. Courts have construed the phrase "matters occurring before the grand jury" to include any item that might reveal what occurred before the grand jury. See id. at 216-17. See also Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987) (secrecy violated when information tends to reveal some secret aspect of the grand jury's investigation). As explained above, Rule 6(e) does not protect only the transcript or the minutes of the grand jury proceedings, but also any information that would reveal the identities of the grand jurors or witnesses, the substance of testimony, the strategy or direction of the investigation, the grand jurors' deliberations or questions, or any comparable matter. Lance, 610 F.2d at 217.

In the instant case, the media reports contain numerous

(...continued)
of the indictment, a fact that supports the inference that the information came from government sources. (The relevant exchange of letters between the Court and the U.S. Attorney is included as Composite Appendix B).

references to the identity and testimony of grand jury witnesses, including not only the content of the witnesses' testimony, but also their demeanor while testifying. For example, the December 8th, 2003 El Nuevo Dia article specifically referred to two witnesses who were subpoenaed by the grand jury, and alluded to the content and purpose of their testimony.[17] Similarly, the April 20th, 2004 El Nuevo Dia article identified, among others, Messrs. Jose Cobian-Guzman, Jose Granados-Navedo, and Marcos Morell-Corrada as grand jury witnesses, commented on the content of their testimonies, and even described two of these witnesses' appearance and demeanor before the grand jury.[18]

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[17] This article, which was published 4 months prior to the first indictment in this case, noted that in order to corroborate a particular financial transaction "the manager of a security boxes company, property of Feliciano, and a messenger from that company were subpoenaed before the Grand Jury, according to sources of El Nuevo Dia." This statement clearly identifies witnesses before the grand jury as well as the purpose and content of their testimony.

[18] With regards to Mr. Cobian-Guzman, the article noted that his testimony, along with documentary evidence and the testimony of the local contractors for the Super Aqueduct project who were allegedly extorted, was part of the evidence presented to the grand jury on Holy Thursday. With regards to Mr. Granados-Navedo, the newspaper reported that the grand jury "forced Granados Navedo...to testify", and described him as "looking nervous...[he] was tearful and did not face the members of the Grand Jury, as disclosed." The article also reported the content of Granados-Navedo's testimony, noting that he "confirmed the illegal payments..." Finally, the article reported that, "according to a source" "Mr. Morell appeared before the Grand Jury showing great verbal mastery and firm disposition. He declared that the payments he had received responded
(continued...)

That same article also reports the appearance before the grand jury of some of Vazquez-Botet's employees, and recounts their testimony about the "visits from Cobian Guzman and from the contractor's assistants to the medical office and delivery of a package, generally in a manila envelope." Likewise, the July 9th, 2004 San Juan Star article identified Mr. Morell as a grand jury witness and recounted his testimony in great detail.[19] Clearly, these articles revealed "matters occurring before the grand jury" insofar as they repeatedly referred to the identity of grand jury witnesses, the substance of their testimony, and even their demeanor while testifying. See Lance, 610 F.2d at 217.

With similar detail, the articles make repeated references to the direction and strategy of the investigation, a matter that has been held to be one "occurring before the grand jury" and thus covered by Rule 6(e). Lance, 610 F.2d at 217. The December 8, 2003 El Nuevo Dia article quoted "a federal source" for the proposition that "the alleged scheme of extortions related to the Super Aqueduct revolves around...Rene Vazquez Botet." This revelation of the focus of the investigation is quite troubling, especially in light of the fact that the article was published 4 months before Vazquez-Botet was indicted.

(...continued)
to a professional services contract he had with CAS, a Cobian Guzman company."

[19] The article reported that Morell testified on December 19 "for about two hours," and that "[h]e was questioned about $5,000 monthly payments he received from convicted contractor Jose Cobian Guzman from 1997-1999." It then went on to describe Morell's response and noted that Mr. Vazquez-Botet "never appeared before the grand jury but was a target from the start of the investigation."

Additionally, that same article makes reference to specific documents regarding Vazquez-Botet requested by the government from a private financial institution. Similarly, the April 20th, 2004 El Nuevo Dia article revealed that, according to "a source close to the Super Aqueduct investigation," the grand jury "ordered a banking institution to reveal the account statements of the store, which had belonged to the wife of Vazquez Botet and another family member." That same article reported that "[t]he Grand Jury also obtained a file with all the payments that a local contractor made to the NPP and to public functionaries and of the party." Finally, the July 9, 2004 San Juan Star article also made detailed disclosures of the direction and strategy of the investigation. The article reported that "Dr. Rene Vazquez Botet could face additional charges...as the grand jury revisits the investigation this month." Similarly, the article notes that "[t]rial attorney Mary Butler...is expected to present evidence this month before the grand jury, which could include calling the FBI agents who worked on the case to testify." It also cited an "investigator" as explaining that "the prosecutor could be asking the grand jury to return a superseding indictment before the end of the summer." Lastly, the San Juan Star article quoted FBI Special-Agent-in-Charge Luis Fraticelli saying that "[t]here are still a lot of things to be done [in the Super Aqueduct investigation]," and reiterating that a particular individual, Dr. Pedro Rossello, "was not the target of a probe." Again, the reports in these newspaper articles referred to "matters occurring before the grand jury," as they commented on the direction and strategy of the investigation, and made detailed disclosures of specific evidence presented to the grand jury. See Lance, 610 F.2d at 217.

However, the mere fact that newspaper articles reveal "matters occurring before the grand jury" does not suffice to constitute a *prima* *facie* case of a Rule 6(e) violation. The article or articles "must [also] indicate the source of the information revealed to be one of those proscribed by Rule 6(e)..." Lance, 610 F.2d at 216-17. On this point, the District of Columbia Circuit has explained that:

> [T]he plaintiff's burden in a Rule 6(e)(2) proceeding is relatively light. The articles submitted need only be susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government; in fact "it is not necessary for [an] article to expressly implicate [the government] as the source of the disclosures if the nature of the information disclosed furnishes the connection."

Barry, 865 F.2d at 1325 (internal quotation omitted). See also Lance, 610 F.2d at 217-218 (holding that it is not necessary for the article to expressly implicate the government as the source if the nature of the information disclosed furnishes the connection). See also United States v. Flemmi, 233 F.Supp.2d 113, 117 (D. Mass. 2000) (citing *Barry* for the same proposition). While "each article must be parsed individually, the testing for a *prima facie* case must also include a review which considers the whole spectrum of news articles." Lance, 610 F.2d at 219. Nearly every article provided by the defense in connection with the Rule 6(e) issue cites a "federal source,"[20] a "source close to the Super Aqueduct investigation,"[21] and "a source close to the investigation of the Federal authorities"[22] as the generators of the reported information. Unlike the "two sources familiar with the investigation" held to be insufficient in *Lance*, 610 F.2d at 218 n.9, the sources cited in the newspaper articles before the Court are more specific in their implication of the government. However, it is also true that these source attributions, without more, would normally be insufficient to establish a *prima facie* case of a Rule 6(e) violation, as they could have come from the witnesses, a grand juror, or the government, and still be a "federal source," or a source close to the investigation of the Federal authorities." See Lance, 610 F.2d at 218 n.9. Nonetheless, in this case, as in *Flemmi*, the fact that these articles only cite general sources rather than particular government personnel

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[20] El Nuevo Dia, December 8, 2003.

[21] El Nuevo Dia, April 20, 2004.

> cannot properly end the inquiry concerning whether the second prong of the *prima facie* test is met. Rather, the articles on their face present a substantial question of whether the required *prima facie* showing of a violation of Rule 6(e)...has been made and the court has not been provided with the affidavits that are typically filed voluntarily by the government in comparable cases.

Flemmi, 233 F.Supp.2d at 118.

In any event, the articles also refer to particular government officials in their discussion of the direction and strategy of the grand jury investigation. Specifically, the July 9, 2004 San Juan Star article reported that "[t]rial attorney Mary Butler from the U.S. Justice Department's Public Integrity Section is expected to present evidence this month before the grand jury, which could include **calling the FBI**

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[22] El Nuevo Dia, July 19, 2004.

agents who worked on the case to testify." (Emphasis supplied). Additionally, the San Juan Star refers to the revelation by "one investigator" that "the prosecutor could be asking the grand jury to return a superseding indictment before the end of the summer." Finally, the San Juan Star reports that "FBI Special-Agent-in-Charge Luis Fraticelli...reiterated...that [Pedro] Rossello was not a target of a probe." Even if the general sources do not suffice, the identification of these particular government agents makes it all the more reasonable to presume that the leaks came from the government.

What is more, the content and context of much of the information in the articles satisfy the relatively light burden of making them "susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government." Barry, 865 F.2d at 1325 (explaining that "it is not necessary for [an] article to expressly implicate [the government] as the source of the disclosures if the nature of the information disclosed furnishes the connection"). There are at least three prime examples in the newspaper articles before the Court of the kind of information that furnishes the presumptive connection between the disclosure and the government source. First, the December 8, 2003 El Nuevo Dia article cites "a federal source" for the disclosure that "the alleged scheme of extortions related to the Super Aqueduct revolves around...Rene Vazquez Botet." This revelation can reasonably be attributed to the government given that it cites a "federal source", that it speaks of the direction of the grand jury investigation specifically naming its main target, and, more importantly, does so 4 months before any indictment was handed down. Similarly, the July 9, 2004 San Juan Star article reported that an "investigator" confirmed that "the prosecutor could be asking the grand jury to return an indictment before the end of the summer."[23] Even ignoring the attribution of the disclosure to "an investigator," at this juncture, and in light of the dearth of affidavits from the government, there is no reasonable inference other than that the government was the source of this detailed information about the direction of the investigation.[24] Lastly, the same article's reference to DOJ trial attorney Mary Butler in the context of the expectation that she "would present evidence [in July] before the grand jury, which could include calling the FBI agents who worked on the case to testify," strongly suggests a nexus between the divulged information and government personnel. Likewise, the San Juan Star's report that SAC Luis Fraticelli told reporters that Pedro Rossello was not a target of the grand jury investigation not only revealed a "matter occurring before the grand jury," but also came directly from the horse's mouth: a government agent covered by the secrecy mandate of Rule 6(e). Again, the substance, nature and context of these disclosures make them susceptible to the "interpretation that the information reported was furnished by an attorney or agent of the government," and thus raise the presumption of government misconduct; a presumption that, as explained below, the government has not properly controverted in this case. Barry, 865 F.2d at 1325.

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[23] The government in fact sought such a superseding indictment, which was handed down on March 3, 2005 (Docket No. 152).

[24] See, e.g. Lance, 610 F.2d at 218 (holding that "[d]isclosures which expressly identify when an indictment would be presented to the grand jury, the nature of the crimes which would be charged, and the number of persons who would be charged run afoul of the secrecy requirements codified in Rule 6(e). It is not necessary for the article to expressly implicate the Justice Department as the source of the disclosures...).

A third consideration the Court must bring to bear in its analysis is that, in light of the broad protections accorded to the media by the First Amendment, the Court "must assume that all statements in the news report[s] are correct." Lance, 610 F.2d at 219. As the *Lance* Court explained, this assumption is a "necessary safeguard to the enforcement of Rule 6(e)," because the complainant will seldom have access to anything beyond the text of the relevant report while the government is in the best position to know whether it is responsible for a violation. Id.[25] Thus, the government's argument that the newspaper articles "guessed (mostly incorrectly) at next steps in the grand jury investigation" is of no moment. (Gov't Reply at 4, Docket No. 211). Even assuming that the articles were in fact incorrect (a rather generous assumption in this case), the inaccuracy is irrelevant for purposes of the Rule 6(e) inquiry as the Court must take the articles as true. Lance, 610 F.2d at 219.

Fourth, a court "must consider the nature of the relief requested and the extent to which it interferes with the grand jury process." Lance, 610 F.2d at 219. Aside from their initial demand for a protective order (Docket No. 22), defendants in this case have only requested an investigation into potential Rule 6(e) violations, a request that remains unchanged at this juncture. Admittedly, drastic remedies like dismissing the indictment, quashing a subpoena *ad testificandum*, or dismissing a grand jury have been held to be highly intrusive into the grand jury's function, thus requiring movants to carry "a heavy burden in attempting to justify such relief." Lance, 610 F.2d at 219. In such situations, courts have been reluctant to find that references by newspapers to general sources such as "officials," "informed sources," or "sources close to the investigation," sufficiently implicated persons covered by Rule 6(e)'s prohibition to warrant such relief where those persons swore they had not breached grand jury secrecy. Id. On the other hand, the Fifth Circuit has held that "a *prima facie* case to secure a hearing on whether to impose contempt sanctions upon government attorneys...does not require as strong a showing" because "[s]uch a hearing carries little threat of conflict with the grand jury proceedings." Analogously, the relief requested by the defendants in the instant case, as well as the Court's chosen course of action delineated in Section V(H), *infra*, have been, and will continue to be, minimally intrusive, if at all, into the grand jury's function. For one, the Court did not interfere in any way with either Grand Jury while they were in session, as the Court's investigation commenced once the indictment had been returned. Similarly, the Magistrate's questioning of the members of Grand Jury 02-1 in no way interfered with that grand jury's or Grand Jury 03-1's functions, as the former had already been disbanded, and the latter had already returned the indictment. Consequently, given the unintrusive nature of the remedy the defense has requested and the weight of the evidence on record, it is clear that the Court's investigation did and does not impermissibly interfere with the grand jury's function and, thus, was, and continues to be, warranted.

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[25] See also In re Special April 1977 Grand Jury, 587 F.2d 889, 892-93 (7th Cir. 1978); United States v. Mitchell, 372 F.Supp. 1239, 1247-48 (S.D.N.Y. 1973); United States v. Archer, 355 F.Supp. 981, 989 (S.D.N.Y. 1972); United States v. Sweig, 316 F.Supp. 1148, 1153-55 (S.D.N.Y. 1970); United States v. Kahaner, 204 F.Supp. 921, 922-23 (S.D.N.Y. 1962).

Finally, the Court "must weigh any evidence presented by the government to rebut the assumed truthfulness of reports which otherwise make a *prima facie* case of misconduct." Lance, 610 F.2d at 219. Aside from its blanket, unsworn denials of government misconduct, the government has not provided the Court with any evidence to contradict the information put forth by the defense. As explained above, the government's complaints about the Court's alleged refusal to credit its blanket unsworn denials of media leaks is of little moment. See Lance, 610 F.2d at 219 (even in light of a responsive affidavit provided by the government denying the allegations of grand jury secrecy violations, "the detail as well as the seriousness of a [Rule 6] violation may militate in favor of a further investigation..."). In any event, the government has not provided affidavits denying the allegations of Rule 6(e) violations. See United States v. Flemmi, 233 F.Supp.2d 113, 117 (D. Mass. 2000) (noting that when a question of possible misconduct is presented by media reports and the government does not concede that a *prima facie* case exists, the government almost always file such affidavits). In light of the government's failure to provide such affidavits, and of the disclosures discussed above, the government's unsworn denials and arguments are insufficient to end the inquiry at this stage. See Id. at 118.

In sum, the defense has come forth with a series of newspaper articles that, parsed individually and taken as a whole, present a substantial question of whether a Rule 6(e) violation has occurred. Because the Court must take the content of these reports as true, Lance, 610 F.2d at 219, and the government has not provided the affidavits that are typically filed voluntarily in comparable cases, Id., the inference of government misconduct remains unrebutted, and the Court had the authority in fact and law to investigate. See, e.g., Flemmi, 233 F.Supp.2d at 118-119. For the same reasons, the Court will continue its investigation as detailed in Section V(H), *infra*. Id.[26]

F. Sealed and Ex-parte Nature of the Court's Investigation

Seemingly aware of the fatal shortcomings of its legal arguments, the government characterizes the Court's investigation as "secret", a qualification completely divorced from reality and dangerously misleading. (Gov't Mot. at 1, Docket No. 200). There are two possible interpretations of the government's importunements about the "secrecy" of the Court's investigation, neither of which holds water. Quite simply, there was and is nothing secret about the Court's investigation, at least as far as the government is concerned.

First, by complaining that the investigation has been "secret", the government might be suggesting, as the word itself seems to, that it was kept in the dark as to the existence of the Court's inquiry into potential grand jury secrecy violations. However, as detailed in section I, *supra*, this argument would be frivolous, at best. Pursuant to a June 1, 2004 *ex parte* sealed defense motion (Docket No. 35), the Court issued a sealed Order on November 9, 2004 ordering an investigation into potential grand jury secrecy violations and referring the matter to Chief Magistrate Judge Justo Arenas. (Docket No. 109). Upon the Magistrate's completion of his report, the Court made the same available to the government and the defense during a March 14, 2005 Status Conference. (Docket No. 159). Pursuant to another *ex parte* sealed defense motion (Docket No. 133), during the March 14, 2005 Conference the Court further advised the parties of its intention to expand its investigation by conducting an expert acoustical examination of the grand jury room and adjacent areas. The government was also notified by defense counsel of another motion germane to the Court's investigation, which was accompanied by an affidavit from former Assistant United States Attorney Joseph Frattallone-Marti. (Aff. of Joseph Frattallone, Docket No. 182). From this abridged recital of the relevant facts, it is obvious that the government was and has been well aware of the Court's investigation. These facts equally discredit the government's contention that the Court has proceeded "with no input from or notice to the government." (Gov't Mot. at 15, Docket No. 200). In fact, the government filed an opposition (Docket No. 178) to one of the defense's motions for additional investigation in light of the Magistrate Judge's report (Docket No. 167) almost three months prior to requesting the Court's recusal.

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[26] The Court reiterates that its finding of a *prima facie* case, which warrants the continuation of the investigation at this juncture, in no way suggests that the government has in fact violated Rule 6(e). See discussion at n.11, *supra*.

The existence of the investigation being known to the government, the only other conceivable interpretation of its "secrecy" argument is as an objection to the Court's decision to proceed through *ex parte* sealed submissions and *in camera* review. However, this argument also proves unavailing. The "use of *in camera* review in proceedings collateral to a grand jury investigation is by no means novel." In re Sealed Case No. 98-3077, 151 F.3d 1059, 1074 (D.C. Cir. 1998). In fact, *in camera* review of a party's *ex parte* proffer "is the most appropriate way to conduct proceedings in Rule 6(e)(2) cases and protect grand jury secrecy." Id. This *in camera* review of a complaining party's *ex parte* submissions is "necessary due to the paramount concern of all courts for the sanctity and secrecy of grand jury proceedings." Id. See also In re Grand Jury Proceedings, 417 F.3d 18, 20 (1st Cir. 2005) (noting that "[s]uch *ex parte* submissions, although surprising to those unacquainted with the practice, have precedent in certain contexts, including grand jury matters and privilege claims.") (citations omitted); In re Grand Jury, 103 F.3d 1140, 1145 (3d Cir.), *cert. denied*, 117 S.Ct. 2412 (1997) (holding that "*[e]x parte in camera* hearings have been held proper in order to preserve the ongoing interest in grand jury secrecy"). Significantly, in *In re Sealed Case*, the District of Columbia Circuit expressly sanctioned the use of *ex parte in camera* procedures to investigate possible Rule 6(e) violations, refusing "unnecessarily to cabin the district court's discretion as to the type of factfinding tools it may use" in its investigation. In re Sealed Case No. 98-3077, 151 F.3d at 1076. Thus, in the context of investigations into potential Rule 6(d) violations, only after the Court finds such violation has occurred is it appropriate to allow the parties to participate in the proceedings to advocate for the "appropriate remedy." Id. (citing Barry, 865 F.2d at 1321-22.

It is clear that the government was well aware of the existence of the Court's inquiry into potential grand jury secrecy violations, and that the Court's decision to conduct the investigation through sealed *ex parte* submissions from the parties was not only within its discretion, but also consistent with the overwhelming weight of precedent. Interestingly, the government availed itself of the Court's *ex parte* proceedings in at least two occasions, the most recent of which came to pass when the government invited the Court to employ *ex parte* procedures in connection with its filing of an affidavit detailing the government's alleged reasons for switching from Grand Jury 02-1 to 03-1. The government simply cannot have its cake and eat it, too. See United States v. Tierney, 760 F.2d 382, 388 (1st Cir. 1985) (noting that "[h]aving one's cake and eating it, too, is not in fashion in this circuit."). Consequently, the government's characterization of the Court's investigation as secret is factually baseless and legally unhelpful.

G. Unsealed nature of August 30, 2005 Order

In yet another glaring and troubling example of misleading citation and reference, the government next claims that the Court publicly issued its August 30, 2005 Order staying the case *sine die* (Docket No. 195) "in a manner that would only taint the government in the eyes of the public." The government either misreads or deliberately misquotes the Court's August 30, 2005 Order, as the same was carefully and deliberately drafted so as not to cast public doubts over, or level accusations against, either party. Additionally, contrary to the government's suggestion, the only reference to the defendants' rights in the Order was in the context of the Court's exclusion of the duration of its investigation from the Speedy Trial Act, and not in the context of its investigation. In sum, no reader of the August 30th Order could have gleaned the focus or extent of the Court's investigation from the text of its August 30th Order. Consequently, any "taint" the government has suffered in the eyes of the public is of its own making, as it expressly divulged the purpose and scope of the Court's investigation to the public via the unsealed version of its recusal motion. (Docket No. 197). To claim that the Court has prejudiced it through its Order while divulging the nature and purpose of the Court's investigation in violation of Local Rule 106(b) is simply untenable. See Tierney, 760 F.2d at 388.

H. The Government's Motions to Stay and Terminate the Investigation

For the reasons discussed above, the government's motions to terminate the Court's investigation (Docket Nos. 198 and 200) are **DENIED**, as the investigation is within the duties and discretion of this Court. The Court's investigation into potential grand jury secrecy violations will proceed in accordance with the steps and parameters that follow. After full compliance with these measures, the Court's investigation will be completed, and the Court will issue a substantive Opinion and Order on the matter. Likewise, because the Court will ultimately deny the government's recusal motion, the motions to stay the investigation pending reassignment to another judge (Docket Nos. 198 and 200) are **DENIED**.

With regards to potential Rule 6(d) and Local Rule 106(c) violations, the Court will re-interview all members of grand jury 02-1. For this purpose, both the government and the defense are **ORDERED** to provide the Court with no more than 10 suggested questions per side. Of course, the Court reserves the right to accept or reject these questions and/or ask questions of its own. Additionally, the government is **ORDERED** to file *ex parte* sealed affidavits from each of the government employees tied to the instant case who were or might have been present in the surrounding area of the grand jury room while Grand Jury 02-1 was in session. See United States v. Flemmi, 233 F.Supp.2d 113, 119 (D. Mass. 2000) (ordering government officials to submit affidavits explaining their role, if any, in alleged violations of Rule 6). In light of the evidence presented by the defense, the government's filings shall include affidavits from Special Agent Ivan Vitousek and Jose Luis Hernandez, both of which shall respond to the allegations contained in Mr. Frattallone-Marti's and Mr. Montilla-

Brogan's affidavits (Docket Nos. 182, Ex. 1, and 219). See id. Finally, the government is **ORDERED** to certify whether or not Special Agent Vitousek was at any time sworn in as agent of Grand Jury 02-1, by submitting a sealed affidavit or the relevant grand jury transcripts.

In the context of potential Rule 6(e) violations, the government is **ORDERED** to file, *ex parte* and under seal, affidavits from each of the government employees, including government attorneys and investigators, authorized to have access to information obtained in any grand jury investigation of the case against Vazquez-Botet and Morell-Corrada. See Flemmi, 233 F.Supp.2d at 119 (ordering the government to produce affidavits from government agents and attorneys to determine whether a Rule 6(e) violation had occurred).

The Court notes that, barring a compelling showing of bias by the defense, it is not now considering the possible dismissal of the indictment as a remedy for any grand jury secrecy violations. If information subject to Rule 6(e) has in fact been improperly disclosed and/or the government has violated Rule 6(d) or Local Rule 106(c), any individual responsible could be held in criminal or civil contempt and punished accordingly. See Fed. R. Crim. P. 6(e)(7); Blalock v. United States, 844 F.2d 1546, 1558 (11th Cir. 1988) (Tjoflat, J., concurring). The Court may also impart equitable relief "depending upon the nature of the violation and what the trial court deems necessary to prevent further unlawful disclosures." In re Sealed Case No. 98-3077, 151 F.3d 1059, 1068 (D.C. Cir. 1998) (quoting Barry v. United States, 865 F.2d 1317, 1323 (D.C. Cir. 1989)) (internal citations omitted).

VI. THE *RIVERA-RANGEL* CASE

Sensing the weakness of its central argument, the government next points to this Court's rulings in the case of United States v. Rivera-Rangel, Cr. No. 02-98 (PG), as a basis for recusal.[27] Specifically, the government argues that the Court's grant of a judgment of acquittal and, in the alternative, a new trial (Cr. No. 02-98, Docket Nos. 131 and 149), as well as the First Circuit's reversal of those rulings, United States v. Rivera-Rangel, 396 F.3d 476 (1st Cir. 2005), somehow make it a partial tribunal unfit to preside over the present case.[28] As a threshold matter, it is significant to note that, as far as the Court is aware, Rivera-Rangel is neither a party nor a witness in the instant action, nor were Vazquez-Botet or Morell-Corrada parties or witnesses in Rivera-Rangel's prosecution. Thus, it is beyond this Court's understanding how its rulings in the *Rivera-Rangel* case are in any way relevant to the matter now before it.[29]

This irrelevance notwithstanding, the government's reliance on the *Rivera-Rangel* case rings hollow for two reasons. First, as a doctrinal matter, it is axiomatic that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion...Almost invariably they are proper grounds for appeal, not for recusal." Liteky, 51 U.S. at 555. This "may be true even when the judicial rulings in question are erroneous." In re Boston's Children First, 244 F.3d 164, 167, n. 7 (1st Cir. 2001). Ignoring this clear precedent, and as if playing to a lay audience, the government makes reference to the Circuit's finding of "manifest abuse of discretion" and its citation of United States v. Rothrock, 806 F.2d 318, 322 (1st Cir. 1986) for the "13th juror" proposition to somehow suggest that this Court engaged in misconduct in its decision to grant Rivera-Rangel's motion for judgment of acquittal. However, the Circuit's reference to "manifest abuse of discretion" is merely the restatement of the standard of review applicable to a district court's grant of a new trial on *Brady* violation bases, and not a finding of partiality or misconduct. See Brady v. Maryland, 373 U.S. 83 (1963). Thus, the government's reference to the Circuit's reversal of this Court's orders in the *Rivera-Rangel* case makes much ado about nothing: this Court made a legal determination which was later reversed on appeal, a series of events that is hardly remarkable in our system of justice.[30] The Court's involvement with the *Rivera-Rangel* matter ended with the Court of Appeals' remand to a different judge, and has no bearing on the instant case. "Painting black lines on the sides of a horse and calling it a zebra does not make it one." United States v. Vazquez Rivera, 135 F.3d 172, 177 (1st Cir.

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[27] The Court's relevant Opinion and Orders in Cr. No. 02-98 are attached hereto as Composite Appendix C.

[28] In an effort to put this Court's rulings in Cr. No. 02-98 in their proper context, it is useful to note that the Court denied defendant's first motion for judgment of acquittal. (Cr. No. 02-98, Docket No. 111).

[29] As discussed in more detail in Section VII, *infra*, the government misleadingly cites the First Circuit's opinion in the Rivera-Rangel Case for the proposition that the Court of Appeals "has recently removed the Court from presiding over another public corruption case involving a defendant of the same political party as the Court and the defendants here." (Gov't Mot. at 2, Docket No. 200). However, even the most searching inquiry into the First Circuit's opinion does not reveal any reference to the Court's or the defendant's political affiliation.

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[30] Additionally, the government correctly makes reference to the fact that the Circuit Court "*sua sponte* reassigned the case to another judge for sentencing." However, this, too, is hardly noteworthy, as courts of appeal habitually reassign cases to a different judge for sentencing than the one who presided over the trial.

1998). Similarly, the government's attempt to make the *Rivera-Rangel* case an issue now is simply a contrived and unavailing stretch. Thus, it is abundantly clear that, in accordance with Liteky and its progeny, the Court's *Rivera-Rangel* legal rulings and their eventual reversal, even if relevant, are not proper grounds for recusal.

Finally, taking a slightly different yet equally flawed tack, the government argues that "[t]he Court's credibility findings [in the *Rivera-Rangel* case] were reversed by the First Circuit as unjustified in February 2005, but the Court's skepticism in *Rivera-Rangel* towards SA Vitousek–who will be a trial witness here–has affected the Court's neutrality in this case." (Gov't Mot. at 18, Docket No. 200).[31] The Court must note at the outset that nowhere in it's relevant opinion and orders (Cr. 02-98, Docket Nos. 131 and 149) is there any mention of Special Agent Vitousek or of his credibility or lack thereof. Similarly, the opinion of the Court of Appeals is also devoid of any mention of

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[31] The government also seeks to cement its charge of bias against Special Agent Vitousek through Special-Agent-in-Charge Luis Fraticelli's affidavit, wherein he alleges that during a meeting with Judges Laffitte and Perez-Gimenez, Judge Laffitte stated that "SA Vitousek was responsible for recent media leaks." (Aff. of SAC Fraticelli ¶ 3, Docket No. 200, Ex. 1). I do not recall Judge Laffitte making any such accusation, and he has denied it under oath, explaining that during the conversation he "merely brought to [SAC Fraticelli's] attention the striking coincidence that in several cases where grand jury leaks appeared to be a problem, the same AUSA and FBI Agent were involved." (Aff. of Judge Laffitte ¶ 3, Docket No. 217). In fact, Judge Laffitte explained that, during a visit to his office, it was FBI Inspector James Finch who "volunteered the name Vitousek when he stated that his name kept coming up." (Id.). In any event, even assuming that Judge Laffitte made the alleged comment, it cannot be attributed to this Court, and is thus irrelevant to the matter of recusal.

Mr. Vitousek. Consequently, it strains logic to conclude that certain alleged credibility determinations, which are nowhere to be found in either this Court's or the Circuit Court's opinions, somehow disable this judicial officer from presiding over the instant case.

However, even if these credibility determinations existed and were somehow relevant, the government's reliance on them would again be fatally misplaced. As explained above, judicial rulings, even if erroneous, are not sufficient grounds for recusal under § 455(a). In re Boston's Children First, 244 F.3d at 167, n.7. Additionally, with regards to credibility determinations in particular, the First Circuit has made clear that, because "it is a judge's job to make credibility determinations", In re Cooper and Lynn, 821 F.2d 833, 838 (1st Cir. 1987), such determinations cannot be a basis for claiming the extrajudicial or personal bias that would serve as the necessary predicate for § 455(a) recusal. Blizard v. Frechette, 601 F.2d 1217, 1220-1222 (1st Cir. 1979). In disagreement with the Court's determinations in the *Rivera-Rangel* case, the government successfully exhausted the remedy provided to it by law: an appeal to the First Circuit. It cannot now seek recusal on a completely unrelated case based on nothing more than inaccurate and speculative inferences drawn from the Circuit Court's opinion. See Liteky, 51 U.S. at 555.

Because "the dead tree gives no shelter," the Court need not go further with regards to the government's reliance on the *Rivera-Rangel* case. T.S. ELLIOT, THE WASTELAND (Boni & Liveright 1922).

VII. POLITICAL AFFILIATION

In a last ditch effort to cast doubt over the Court's impartiality, the government argues that the "Court cannot be a neutral arbiter in cases involving highly-placed [New Progressive Party] officials." (Gov't Mot. at 18, Docket No. 200). It is well settled that "[e]very judge comes to the bench with a lifetime of background experiences, a roster of associations, and a myriad of views. This past history, in and of itself is seldom sufficient to require recusal." Comfort v. Lynn School Committee, 418 F.3d 1, 26 (1st Cir. 2005). Unless there is "some direct link that establishes a reasonable basis for doubting impartiality," the judge should not step aside. Id.[32] In an attempt to establish some sort of link between the Court's alleged political affiliation and the instant case, the government builds its argument on two wobbly pillars: (1) an affidavit from FBI Special-Agent-in-Charge Luis S. Fraticelli (Aff. of SAC Fraticelli, Docket No. 200, Ex. 1); and (2) the First Circuit's reversal of some of this Court's rulings in the Case of *U.S. v. Rivera-Rangel*, 396 F.3d 476 (1st Cir. 2005). The Court will consider each in turn.

Before delving into the government's references to the Court's alleged political affiliation, however, we pause to consider a threshold matter. The lynchpin of the government's argument is that the Court is a "strong [supporter] of the NPP [New Progressive Party]," the same party Vazquez-Botet and Morell-Corrada worked for during the time the charged offenses allegedly occurred. (Aff. of SAC Fraticelli ¶ 4, Docket No. 200, Ex. 1). Indeed, if it is not successful in proving the

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[32] Indeed, to hold that a judge's political affiliation, without more, is a sufficient ground for recusal would turn the federal judiciary into a virtually unpeopled desert, as "it is common knowledge...that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections..." Home Placement Service, Inc. v. Providence Journal Co., 739 F.2d 671, 675 (1st Cir. 1984).

Court's alleged political affiliation, the government's argument falls flat on its face. A searching study of the record in the instant case reveals only one attempt to establish the Court's political affiliation, which is contained in the affidavit of Special-Agent-in-Charge Luis S. Fraticelli.[33] In his sworn statement appended to the government's sealed motion SAC Fraticelli states that "[t]he NPP is the pro-statehood party in Puerto Rico, and [he] know[s] both Judge Laffitte and Judge Perez-Gimenez to be strong supporters of the NPP." (Aff. of SAC Fraticelli ¶ 4, Docket No. 200, Ex. 1). SAC Fraticelli does not offer any evidence for his conclusion about this Court's or Judge Laffitte's political affiliation, and curiously claims that he "do[es] not know whether former acting U.S. Attorney Guillermo Gil and AUSA Kellog are supporters of the PDP [Popular Democratic Party]." (Id.)[34]

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[33] Although the government includes a conclusory footnote in which it claims that "[t]he Court and the defendants in this case are members of the NPP, the pro-Statehood party in Puerto Rico," it fails to provide any substantiation or corroboration for its remark. (Gov't Mot. at 2 n.1, Docket No. 200).

[34] Even assuming the Court shares the pro-statehood ideology, SAC Fraticelli's reference to the fact that the NPP is the pro-statehood party in Puerto Rico cannot seriously be considered evidence of party affiliation for at least two reasons. First, as a practical and logical matter not all individuals of pro-statehood mentality are required to be, or in fact are, members of the NPP. That is, it is possible to be pro-statehood and not "a strong supporter of the NPP." Second, it is well settled that "our system of justice would be paralyzed if judges were disqualified[...]because of views about[...]abstract policy issues." Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d at 491-492 (also holding that "[n]o reasonable person could seriously have questioned Judge Perez-Gimenez's impartiality (continued...)

However haunting the image of federal agents (especially those with supervisory duties like Special-Agent-in-Charge Fraticelli) investigating and profiling individuals in order to ascertain their political affiliations might be, the Court need not dwell on it at this point. Suffice it to state that SAC Fraticelli's unsubstantiated and uncorroborated conclusion that two Article III judges with a long record of judicial service are "strong supporters" of one political party or another cannot, even in the most generous analysis, be enough to prove what the government must: that the Court is in fact a member or supporter of the same political party as the defendants. This utter lack of evidence notwithstanding, and in the interest of thoroughness, the Court will assume that the government in fact showed that the Court is affiliated to the NPP and will proceed with its analysis.

A. SAC Fraticelli's Affidavit

As previously mentioned, SAC Fraticelli provided an affidavit, which the government appended to its recusal motion as Exhibit 1. (Aff. of SAC Fraticelli, Docket No. 200, Ex. 1). In the affidavit, SAC Fraticelli recounts his version of two meetings with the Court. As more fully described in section VI, *supra,* the first meeting between SAC Fraticelli and the Court took place in the chambers of then Chief Judge Laffitte and dealt with alleged press leaks "in several highly-publicized cases in which the FBI was the lead investigative agency." (Aff. of SAC Fraticelli ¶¶ 2-3, Docket No. 200, Ex. 1).[35] According to SAC

(...continued)
because of his generalized pro-statehood philosophy").

[35] As mentioned above, the Court's and Judge Laffitte's concern with repeated press leaks in this District is not new, and was shared by U.S.
(continued...)

Fraticelli's own affidavit, there was only one reference allegedly made to political parties in general or the NPP in particular during that meeting, and the same was allegedly made by Judge Laffitte, not this Court.[36] Even making the overgenerous assumption that Judge Laffitte in fact made the comment, and it was somehow indicative of political affiliation or bias (an inferential leap this Court in good conscience cannot make), it surely was not and cannot be attributed to this Court.[37] Thus, SAC Fraticelli's recital of his initial meeting with this Court and Judge Laffitte does not provide the required "direct link" between the Court's alleged political affiliation and the instant case. See Comfort, 418 F.3d at 26.

(...continued)
Attorney H.S. Garcia. In fact, U.S. Attorney Garcia referred unrelated leaks for investigation, and *sua sponte* expanded the investigation to include leaks in the "Supertubo" case. See Section V(E) n.14, *supra*, and Composite Appendix A.

[36] According to Fraticelli, Judge Laffitte allegedly asked him whether "the FBI had a squad specifically dedicated to investigating members of the NPP," which Fraticelli denied. (Aff. of SAC Fraticelli ¶ 5, Docket No. 200, Ex. 1). I do not recall Judge Laffitte asking such a question, and he has categorically denied doing so. (Aff. of Judge Laffitte ¶ 6, Docket No. 217).

[37] The implausibility of this assumption is further underscored by Judge Laffitte's affidavit, wherein he clarifies that he has "never discussed politics with Agent Fraticelli," and has "not been involved in any political fundraising or other political activities for more than 20 years." (Aff. of Judge Laffitte ¶ 5, Docket No. 217). Furthermore, Judge Laffitte notes "[i]nsofar as [Agent Fraticelli] is insinuating that there is some question as to [his] impartiality in political corruption cases involving members of the NPP, his accusation is baseless and unfounded." (Id.).

The second reference to political affiliation in SAC Fraticelli's affidavit arises in the context of a second meeting with the Court, this time in its own chambers and without the presence of Judge Laffitte. In his statement, SAC Fraticelli alleges that during the meeting the Court

> informed [him] that a 'confidential source', which [the Court] refused to name, told [the Court] that the press was alerted by someone in the USAO about an important witness appearing before the grand jury in relation to the Superaqueduct case. Judge Perez-Gimenez advised [SAC Fraticelli] to be careful with AUSA Nereida Melendez because she is affiliated with the PDP. [Fraticelli] took this to mean that Judge Perez-Gimenez now believed that AUSA Melendez was the source of the alleged 'leaks.'

(Aff. of SAC Fraticelli ¶ 9, Docket No. 200, Ex. 1). That what SAC Fraticelli "took the Court's comments to mean" is a vague and speculative ground on which to base a recusal motion is hard to question. Even ignoring this, the Court makes two observations which should put Fraticelli's statements and their relevance to the recusal issue in their proper context.

First, assuming, *arguendo*, the Court made such statements and in fact referred to AUSA Melendez's political affiliation in a show of bias or partiality, it is hard to see how those comments, even if inappropriate, would warrant recusal from the instant case. This is so because AUSA Melendez is not an attorney of record for the government in the present case. Claiming that a judge should recuse himself on grounds that he is politically biased against an attorney who is not related in any way to the case is simply untenable. Second, the Court's statements to SAC Fraticelli regarding AUSA Melendez's possible political affiliation must be considered in their proper context.

See In re Martinez-Catala, 129 F.3d 213, 220 (1st Cir. 1997) (noting that "however dramatic the phrase may sound in the abstract, in context it was here used as part of a perfectly permissible suggestion by the district judge."); Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 1438, 1460 (1st Cir. 1992) (also highlighting the importance of context in evaluating a judge's statements). Though subject to misinterpretation when considered in a vacuum, the Court's alleged reference to AUSA Melendez's potential party affiliation with the PDP was particularly relevant given that, if it were found to be true, it would shed helpful light on the recurrent leaks regarding high-profile public corruption cases involving NPP officials. After all, in the context of recurring and increasingly worrisome leaks concerning grand jury proceedings, it was perfectly reasonable to suggest that, given the defendants' militancy with the NPP, a possible source for the leaks could have been members of that party's main political opposition, the PDP. In other words, the Court would have found it equally logical and reasonable to suggest that the source of media leaks concerning grand jury targets and criminal defendants identified with the PDP could be an individual identified with the NPP who was in a position to make such leaks. Thus, even if relevant, taken in its proper context, the Court's alleged statement to SAC Fraticelli regarding AUSA Melendez's alleged political affiliation was not a statement of bias or partiality in favor of NPP supporters and against PDP militants, but an objective, reasonable, and relevant assessment made to the director of the federal agency tasked with investigating recurrent media leaks about ongoing grand jury proceedings involving high-profile former NPP officials.

Additionally, as part of its investigation, the Court learned that Assistant United States Attorney Guillermo Gil told the first grand jury summoned to investigate the facts underlying the instant case (Grand

Jury 02-1) that "corruption has a first and last name, which was the New Progressive Party." (Transcript of Chief Magistrate Judge Arena's questions to grand jury 02-1, December 7, 2004 at 7). This outrageous injection of politics into the grand jury room, and before a grand jury empaneled to hear a case involving former New Progressive Party officials, makes it legitimate and reasonable (if not obvious) for the Court to suggest that a possible source of grand jury media leaks could be individuals identified with the NPP's political opposition. This suggestion, however, in no way intimates the Court's own party allegiance, nor does it provide an objective basis for a knowledgeable individual to reasonably question its impartiality. Additionally, the Court approvingly notes the defense's suggestion that it would be untenable to allow the government to "unjustly inject politics into the case and then claim the trial judge must be disqualified because the case has become political due to some connection between the government's improper accusations and the judge." (Defs.' Resp. at 40, Docket No. 206). The Court will not sanction such contrived and strained efforts to effectively manufacture grounds for recusal where there are otherwise none. Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971). See, e.g., In re United States, 158 F.3d 26, 35 (1 st Cir. 1998) (holding that a party "cannot cast sinister aspersions, fail to provide a factual basis for those aspersions, and then claim that the judge must disqualify herself because the aspersions, *ex propio vigore*, create a cloud on her impartiality."); In re Bellsouth Corp., 334 F.3d 941 (11 th Cir. 2003) (rejecting practice of retaining particular counsel so as to create a conflict with the presiding judge); Wilksa v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (ruling that a party may not manufacture grounds for recusal by leveling "deliberate attack[s] on the trial judge.").

Consequently, deprived of the underlying innuendo and conjecture, and taken in their proper context, the meetings involving the

Court and SAC Fraticelli, as well as the allegedly political comments made by the Court do not require the Court's recusal. They simply would not provide an objective individual informed of all the facts with a reasonable basis to doubt this Court's impartiality.

B. First Circuit's Reversal of Ramirez-Rangel Rulings

Finally, the government makes the misleading and arguably unethical claim that "[t]he First Circuit has recently removed the Court from presiding over another public corruption case involving a defendant of the same political party as the Court and the defendants here." (Gov't Mot. at 2, Docket No. 200). The government directly cites the First Circuit's opinion in *Rivera-Rangel*, 396 F.3d 476 (1st Cir. 2005), in support of this proposition.[38] However, even the closest study of the First Circuit's opinion in *Rivera-Rangel* reveals no reference whatsoever to this judicial officer's political affiliation. Much less does the Circuit even come close to intimating that political affiliation played any role in its decision to reverse this Court's rulings and remand the case to a different judge for sentencing. Consequently, citing the First Circuit's *Rivera-Rangel* opinion for the proposition the government does is nothing short of an attempt to mislead the Court and misrepresent the First Circuit's holding. That an attorney certifies with his signature that the contents of his pleadings and motions have a factual and legal basis need not be belabored. See, e.g., Fed. R. Civ. P. 11 (forbidding an attorney from negligently or intentionally misleading the court about the law). See, e.g., Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986). The Court would hate to think that, in its zeal to secure this judicial officer's recusal, the government has deemed it necessary to resort to misleading citations of a First Circuit opinion.[39] Aside from this misleading and strained citation of the First Circuit's *Rivera-Rangel* opinion, the government points to nothing more to substantiate its claim that the Court's alleged political affiliation has tainted these proceedings.

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[38] The government prefixed its citation to the *Ramirez-Rangel* case with a "See" introductory signal. (Gov't Mot. at 2, Docket No. 200). According to *The Bluebook: A Uniform System of Citation*, Sixteenth Edition, "See" indicates that the "cited authority **directly** *states* or *clearly supports* the proposition" it follows. (Emphasis supplied).

As a separate matter, and as more fully explained in section IV, *supra*, it is difficult to overlook the untimeliness of the government's argument based on the meetings between the Court and SAC Fraticelli, as well as on the First Circuit's reversal of the Court's *Rivera-Rangel* rulings. For the sake of assiduousness, the Court has chosen to ignore the potential effects of this untimeliness on whether the government's reliance on its meetings with SAC Fraticelli should even be considered. However, such dilatory and selective argumentation goes far in suggesting that the government has used its recusal motion as a tactical weapon in response to unfavorable rulings, and in an attempt to find a judge more to their liking, a litigation strategy strenuously and consistently rejected by this and other Circuits.

In sum, the government has provided little more than insufficient innuendo about the Courts partiality due to political affiliation. However, much to the government's dismay, the First Circuit has explained quite pithily that "no permissible reading of subsection 455(a) would suggest that Congress intended to allow a litigant to compel disqualification simply on unfounded innuendo concerning the *possible* partiality of the presiding judge." El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 140 (1st Cir. 1994). Consequently, this last ground offered by the government, like the others, is insufficient to warrant the Court's recusal.

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[39] Even more troubling is the decision of the Deputy Assistant Attorney General, the Public Integrity Section Chief, and the Appellate Section Chief to tolerate and participate in this troubling and sanctionable litigation practice by signing the government's motion. At the very least, their signature of a motion containing such a misrepresentation seems to run counter to the government's assurance that "[t]he United States Department of Justice does not file lightly a motion to recuse a sitting United States District Judge." (Gov't Mot. at 2, Docket No. 200).

VIII. CONCLUSION

Seen through the undistorted prism of context and stripped of its sensationalistic rhetoric, the government's recusal motion is based on little more than a flimsy affidavit and unsupportable speculation. It plainly lacks the factual basis that would move an objective, fully informed observer to reasonably question this Court's impartiality. See 28 U.S.C. § 455(a). Just as a judge "must assiduously avoid participating in any proceeding in which his impartiality might reasonably be questioned, so too...must [he] avoid yielding in the face of unfounded insinuations." In re United States, 158 F.3d at 35 (internal citations omitted). As Judge Hector Laffitte recently highlighted on occasion of his retirement from active to senior judge, "[t]he law is the law and it must be upheld." "It is the business of judges to be indifferent to popularity." Chisom v. Roemer, 501 U.S. 380, 401, n.29 (1980) (internal quotations omitted). We "must strive to do what is legally right, all the more so when the result is not the one the 'home crowd' wants." Republican Party of Minnesota v. White, 536 U.S. 765, 806 (2002) (citing William Rehnquist, *Dedicatory Address: Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 229-300 (1980). Consequently, and for the reasons set forth above, the government's recusal motions (Docket Nos. 197 and 200) are **DENIED**. Likewise, the government's motions to stay and terminate the Court's investigation into possible violations of Fed. R. Crim. P. 6(d) and (e) (Docket Nos. 198 and 200) are **DENIED**, and the same shall continue to the extent detailed in Section V(H) of this opinion.

SO ORDERED.

In San Juan, Puerto Rico, December 15, 2005.

S/JUAN M. PEREZ-GIMENEZ
U. S. DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 06-1136

IN RE: UNITED STATES,

Petitioner.

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch,
Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: May 4, 2006

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majoarity of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk

[cc: Messrs: Solomon, Vega-Pabon, Srebnick, Rebello-Casalduc, Rivera Bujosa, Strafer, Ms. Felton and Ms. Butler]